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ONTARIO LABOUR RELATIONS BOARD REPORTS



January 1994



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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1994] OLRB REP. JANUARY

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.



Typeset, Printed and Bound by Union Labour in Ontario

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Construction Industry Grievance - Construction Industry - Practice and Procedure - Reconsidera-

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JOHN MAGGIO EXCAVATING LTD.; RE IUOE, LOCAL 793 31

Crown Transfer - Bargaining Rights - Judicial Review - Ministry of Correctional Services contracting with several community organizations to provide various services to inmates including discharge planning, cultural liaison, and counselling - Whether each contract constituting transfer of part of Crown's "undertaking" to the community agency - Board not persuaded that the right to perform particular services created by subcontract is "part" of Crown's "undertaking" to which bargaining rights attach or which create successor ship on execution of contract - Crown transfer application dismissed by Board - Divisional Court dismissing union's application for judicial review

ST. LEONARD'S SOCIETY OF METROPOLITAN TORONTO AND COMMUNITY LIAISON SERVICES AND BLACK INMATES AND FRIENDS ASSEMBLY, THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF CORRECTIONAL SERVICES AND; RE OPSEU 126

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Administrative and Production Supervisor, Fine Arts Liaison Officer, Administrative Officer, Convocation Officer, Assistant Director of Secondary School Liaison, and Manager of Administrative Computing found not to be “employees”

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RED CROSS SOCIETY ONTARIO DIVISION, THE CANADIAN, VICTORIAN ORDER OF NURSES BRANT-HALDIMAND-NORFOLK, COMCARE (CANADA) LIMITED, MED CARE PARTNERSHIP, THE VISITING HOMEMAKERS ASSOCIATION OF HAMILTON-WENTWORTH, HAMILTON-WENTWORTH HOME CARE PROGRAM - VICTORIAN ORDER OF NURSES AND VICTORIAN ORDER OF NURSES RESPITE PROGRAM, THE REGIONAL MUNICIPALITY OF HAMILTON-WENTWORTH, OLSTEN HEALTH CARE SERVICES, MEDICAL PERSONNEL POOL (HAMILTON) LTD., MOHAWK MEDICAL SERVICES, PARA-MED HEALTH SERVICES AND BRANT COUNTY HOME CARE PROGRAM, VETERANS AFFAIRS CANADA; RE S.E.I.U., LOCAL 204 AND LOCAL 532 34

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Interference in Trade Unions - Change in Working Conditions - Intimidation and Coercion - Unfair Labour Practice - Board finding that installation of video surveillance cameras in workplace motivated, at least in part, by anti-union *animus* - Installation of cameras also violating statutory freeze - Union’s complaint allowed and employer directed to remove cameras forthwith

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Intimidation and Coercion - Change in Working Conditions - Interference in Trade Unions - Unfair Labour Practice - Board finding that installation of video surveillance cameras in workplace motivated, at least in part, by anti-union *animus* - Installation of cameras also violating statutory freeze - Union's complaint allowed and employer directed to remove cameras forthwith

ROYALGUARD VINYL CO., A DIVISION OF ROYPLAST LIMITED; RE USWA

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Intimidation and Coercion - Employer - Interference in Trade Unions - Strike - Strike Replacement Workers - Unfair Labour Practice - "Home Cares" contracting with various "service provider" agencies, including Red Cross, to provide various therapeutic and support services to clients in their homes - Red Cross employees commencing legal strike - Home Cares arranging for other service providers to attend to clients - Union alleging breach of statutory ban on use by employer of strike replacement workers - Board not accepting union's argument that Home Cares actually true "employer" in this case or that Home Cares and service providers "acting on behalf" of Red Cross - Applications under sections 73.1 and 73.2 dismissed - Board finding that letter sent to Red Cross employees suggesting that employees might lose their jobs if they commenced or stayed on strike violating the *Act*

RED CROSS SOCIETY ONTARIO DIVISION, THE CANADIAN, VICTORIAN ORDER OF NURSES BRANT-HALDIMAND-NORFOLK, COMCARE (CANADA) LIMITED, MED CARE PARTNERSHIP, THE VISITING HOMEMAKERS ASSOCIATION OF HAMILTON-WENTWORTH, HAMILTON-WENTWORTH HOME CARE PROGRAM - VICTORIAN ORDER OF NURSES AND VICTORIAN ORDER OF NURSES RESPITE PROGRAM, THE REGIONAL MUNICIPALITY OF HAMILTON-WENTWORTH, OLSTEN HEALTH CARE SERVICES, MEDICAL PERSONNEL POOL (HAMILTON) LTD., MOHAWK MEDICAL SERVICES, PARA-MED HEALTH SERVICES AND BRANT COUNTY HOME CARE PROGRAM, VETERANS AFFAIRS CANADA; RE S.E.I.U., LOCAL 204 AND LOCAL 532

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Judicial Review - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by pro-

vincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Motions Court judge granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Motion to produce various reports and documents dismissed - Full panel of Divisional Court allowing appeal and setting aside order of motions court judge

ELLIS-DON LIMITED; RE THE ONTARIO LABOUR RELATIONS BOARD AND IBEW, LOCAL 894.....

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Judicial Review - Bargaining Rights - Crown Transfer - Ministry of Correctional Services contracting with several community organizations to provide various services to inmates including discharge planning, cultural liaison, and counselling - Whether each contract constituting transfer of part of Crown's "undertaking" to the community agency - Board not persuaded that the right to perform particular services created by subcontract is "part" of Crown's "undertaking" to which bargaining rights attach or which create successor ship on execution of contract - Crown transfer application dismissed by Board - Divisional Court dismissing union's application for judicial review

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Judicial Review - Constitutional Law - Construction Industry - Construction Industry Grievance - Board dismissing employer's submission that construction of banks by bank employees within sphere of federal labour relations - Board assuming jurisdiction to deal with grievance - Bank seeking judicial review - Divisional Court finding construction of new bank building to be ordinary construction activity and within provincial jurisdiction - Judicial review application dismissed - Motion for leave to appeal dismissed by Court of Appeal - Application for leave to appeal to Supreme Court of Canada dismissed

TORONTO-DOMINION BANK, THE; RE CJA, LOCAL 785, ONTARIO LABOUR RELATIONS BOARD, ATTORNEY GENERAL OF CANADA AND ATTORNEY GENERAL OF ONTARIO

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Jurisdictional Dispute - Adjournment - Construction Industry - Construction Industry Grievance - Parties - Practice and Procedure - Board rejecting employer's motion that Board defer consideration of grievance to allow it to file jurisdictional dispute complaint - Board noting that parties had not addressed whether employer's unrepresented labourers, Labourers' union, or other contractors have status to intervene in the proceeding

SARNIA WOLVERINE MANUFACTURING LTD.; RE UA, LOCAL UNION 663

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Jurisdictional Dispute - Construction Industry - Labourers' union and IBEW disputing assignment of work in connection with installation of Trenwa duct system - Board directing that disputed work be assigned to IBEW in Board Area No. 2

ADAM CLARK COMPANY LTD., I.B.E.W., LOCAL 530 AND; RE L.I.U.N.A., LOCAL 1089

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Natural Justice - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical

Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Motions Court judge granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Motion to produce various reports and documents dismissed - Full panel of Divisional Court allowing appeal and setting aside order of motions court judge

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Parties - Adjournment - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Practice and Procedure - Board rejecting employer's motion that Board defer consideration of grievance to allow it to file jurisdictional dispute complaint - Board noting that parties had not addressed whether employer's unrepresented labourers, Labourers' union, or other contractors have status to intervene in the proceeding

SARNIA WOLVERINE MANUFACTURING LTD.; RE UA, LOCAL UNION 663 68

Practice and Procedure - Adjournment - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Parties - Board rejecting employer's motion that Board defer consideration of grievance to allow it to file jurisdictional dispute complaint - Board noting that parties had not addressed whether employer's unrepresented labourers, Labourers' union, or other contractors have status to intervene in the proceeding

SARNIA WOLVERINE MANUFACTURING LTD.; RE UA, LOCAL UNION 663 68

Practice and Procedure - Construction Industry - Construction Industry Grievance - Remedies - Whether certain job site in Kemptville falling within geographic area assigned to Labourers' union Local 247 under collective agreement - Board applying *M. Sullivan & Son* case and concluding that, under provincial agreement, no local union having exclusive jurisdiction over Kemptville - Employer not violating collective agreement when it hired from Local 527 rather than Local 247 - Grievance dismissed - Employer seeking costs - Board analyzing costs issue in detail and concluding that in section 126 proceedings, in absence of specific provision in collective agreement, Board has no jurisdiction to award legal costs as such - Board, however, directing Local 247 to reimburse employer for its share of section 126(4) expenses

BELLAI BROTHERS LTD.; RE LIUNA, LOCAL 247; RE LIUNA, LOCAL 527 2

Practice and Procedure - Construction Industry - Construction Industry Grievance - Reconsideration - Employer failing to attend Board hearing and seeking to have Board reconsider decision making various orders and declarations - Employer claiming that union official represented that Board hearing scheduled for 2:30 p.m. and not 9:30 a.m. as indicated in Board's Notice of Hearing - Board finding that party who fails to check Notice of Hearing and chooses to rely on recollection or representation of others does so at its own risk - Reconsideration application dismissed

JOHN MAGGIO EXCAVATING LTD.; RE IUOE, LOCAL 793 31

Reconsideration - Construction Industry - Construction Industry Grievance - Practice and Procedure - Employer failing to attend Board hearing and seeking to have Board reconsider decision making various orders and declarations - Employer claiming that union official represented that Board hearing scheduled for 2:30 p.m. and not 9:30 a.m. as indicated in Board's Notice of Hearing - Board finding that party who fails to check Notice of Hearing and chooses to rely on recollection or representation of others does so at its own risk - Reconsideration application dismissed

JOHN MAGGIO EXCAVATING LTD.; RE IUOE, LOCAL 793 31

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Remedies - Construction Industry - Construction Industry Grievance - Practice and Procedure - Whether certain job site in Kemptville falling within geographic area assigned to Labourers' union Local 247 under collective agreement - Board applying *M. Sullivan & Son* case and concluding that, under provincial agreement, no local union having exclusive jurisdiction over Kemptville - Employer not violating collective agreement when it hired from Local 527 rather than Local 247 - Grievance dismissed - Employer seeking costs - Board analyzing costs issue in detail and concluding that in section 126 proceedings, in absence of specific provision in collective agreement, Board has no jurisdiction to award legal costs as such - Board, however, directing Local 247 to reimburse employer for its share of section 126(4) expenses

BELLAI BROTHERS LTD.; RE LIUNA, LOCAL 247; RE LIUNA, LOCAL 527

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Security Guards - Bargaining Unit - Certification - Employee - Board determining that "site supervisors" employed by security firm not exercising managerial functions within meaning of section 1(3) of the *Act* - "Site supervisors" included in bargaining unit - Final certificate issuing

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Strike - Employer - Interference in Trade Unions - Intimidation and Coercion - Strike Replacement Workers - Unfair Labour Practice - "Home Cares" contracting with various "service provider" agencies, including Red Cross, to provide various therapeutic and support services to clients in their homes - Red Cross employees commencing legal strike - Home Cares arranging for other service providers to attend to clients - Union alleging breach of statutory ban on use by employer of strike replacement workers - Board not accepting union's argument that Home Cares actually true "employer" in this case or that Home Cares and service providers "acting on behalf" of Red Cross - Applications under sections 73.1 and 73.2 dismissed - Board finding that letter sent to Red Cross employees suggesting that employees might lose their jobs if they commenced or stayed on strike violating the *Act*

RED CROSS SOCIETY ONTARIO DIVISION, THE CANADIAN, VICTORIAN ORDER OF NURSES BRANT-HALDIMAND-NORFOLK, COMCARE (CANADA) LIMITED, MED CARE PARTNERSHIP, THE VISITING HOMEMAKERS ASSOCIATION OF HAMILTON-WENTWORTH, HAMILTON-WENTWORTH HOME CARE PROGRAM - VICTORIAN ORDER OF NURSES AND VICTORIAN ORDER OF NURSES RESPITE PROGRAM, THE REGIONAL MUNICIPALITY OF HAMILTON-WENTWORTH, OLSTEN HEALTH CARE SERVICES, MEDICAL PERSONNEL POOL (HAMILTON) LTD., MOHAWK MEDICAL SERVICES, PARA-MED HEALTH SERVICES AND BRANT COUNTY HOME CARE PROGRAM, VETERANS AFFAIRS CANADA; RE S.E.I.U., LOCAL 204 AND LOCAL 532

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Strike Replacement Workers - Employer - Interference in Trade Unions - Intimidation and Coercion - Strike - Unfair Labour Practice - "Home Cares" contracting with various "service provider" agencies, including Red Cross, to provide various therapeutic and support services to clients in their homes - Red Cross employees commencing legal strike - Home Cares arranging for other service providers to attend to clients - Union alleging breach of statutory ban on use by employer of strike replacement workers - Board not accepting union's argument that Home Cares actually true "employer" in this case or that Home Cares and service providers "acting on behalf" of Red Cross - Applications under sections 73.1 and 73.2 dismissed - Board finding that letter sent to Red Cross employees suggesting that employees might lose their jobs if they commenced or stayed on strike violating the *Act*

RED CROSS SOCIETY ONTARIO DIVISION, THE CANADIAN, VICTORIAN ORDER OF NURSES BRANT-HALDIMAND-NORFOLK, COMCARE (CANADA) LIMITED, MED CARE PARTNERSHIP, THE VISITING HOMEMAKERS ASSOCIATION OF HAMILTON-WENTWORTH, HAMILTON-WENTWORTH HOME CARE PROGRAM - VICTORIAN ORDER OF NURSES AND VICTORIAN ORDER OF NURSES RESPITE PROGRAM, THE REGIONAL MUNICIPALITY OF HAMILTON-WENTWORTH, OLSTEN HEALTH CARE SERVICES, MEDICAL PERSONNEL POOL (HAMILTON) LTD., MOHAWK MEDICAL SERVICES, PARA-MED HEALTH SERVICES AND BRANT COUNTY HOME CARE PROGRAM, VETERANS AFFAIRS CANADA; RE S.E.I.U., LOCAL 204 AND LOCAL 532

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Unfair Labour Practice - Change in Working Conditions - Interference in Trade Unions - Intimidation and Coercion - Board finding that installation of video surveillance cameras in workplace motivated, at least in part, by anti-union *animus* - Installation of cameras also violating statutory freeze - Union's complaint allowed and employer directed to remove cameras forthwith

ROYALGUARD VINYL CO., A DIVISION OF ROYPLAST LIMITED; RE USWA

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Unfair Labour Practice - Employer - Interference in Trade Unions - Intimidation and Coercion - Strike - Strike Replacement Workers - "Home Cares" contracting with various "service provider" agencies, including Red Cross, to provide various therapeutic and support services to clients in their homes - Red Cross employees commencing legal strike - Home Cares arranging for other service providers to attend to clients - Union alleging breach of statutory ban on use by employer of strike replacement workers - Board not accepting union's argument that Home Cares actually true "employer" in this case or that Home Cares and service providers "acting on behalf" of Red Cross - Applications under sections 73.1 and 73.2 dismissed - Board finding that letter sent to Red Cross employees suggesting that employees might lose their jobs if they commenced or stayed on strike violating the *Act*

RED CROSS SOCIETY ONTARIO DIVISION, THE CANADIAN, VICTORIAN ORDER OF NURSES BRANT-HALDIMAND-NORFOLK, COMCARE (CANADA) LIMITED, MED CARE PARTNERSHIP, THE VISITING HOMEMAKERS ASSOCIATION OF HAMILTON-WENTWORTH, HAMILTON-WENTWORTH HOME CARE PROGRAM - VICTORIAN ORDER OF NURSES AND VICTORIAN ORDER OF NURSES RESPITE PROGRAM, THE REGIONAL MUNICIPALITY OF HAMILTON-WENTWORTH, OLSTEN HEALTH CARE SERVICES, MEDICAL PERSONNEL POOL (HAMILTON) LTD., MOHAWK MEDICAL SERVICES, PARA-MED HEALTH SERVICES AND BRANT COUNTY HOME CARE PROGRAM, VETERANS AFFAIRS CANADA; RE S.E.I.U., LOCAL 204 AND LOCAL 532

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2505-90-JD Labourers' International Union of North America, Local 1089, Applicant v. International Brotherhood of Electrical Workers, Local 530 and Adam Clark Company Ltd., Responding Party

Construction Industry - Jurisdictional Dispute - Labourers' union and IBEW disputing assignment of work in connection with installation of Trenwa duct system - Board directing that disputed work be assigned to IBEW in Board Area No. 2

BEFORE: *Inge M. Stamp*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

DECISION OF THE BOARD; January 26, 1994

1. In this jurisdictional dispute the parties agreed to proceed under the new statutory provisions. By decision dated January 2, 1992 [now reported at [1992] OLRB Rep. Jan. 6] the Board limited the scope of the past practice to "... precast concrete ducts in the ICI sector in Board Area No. 2."

2. The Board has reviewed all of the materials and written submissions and makes the following finding with respect to the work in dispute.

3. The work in dispute, as agreed by the parties, is set out in the Pre-Hearing Conference Memo of Vice-Chair Satterfield as follows:

The installation of Trenwa duct at the Dawn Compressor Station (Union Gas), including the installation and levelling of the U-bracket supports for the duct sections, the installation and levelling of the precast concrete sections which form the walls of the Trenwa Duct System, the cutting of the slabs with a concrete saw where ducting is to be angled and all off-loading and handling of the duct work materials.

4. The memo goes on to say:

"For purposes of clarity, the following work is not in dispute:

- (1) excavating the trench;
- (2) cleaning and levelling the bottom of the trench;
- (3) shovelling pea gravel into the trench;
- (4) levelling the gravel bed;
- (5) placing drain tiles on top of the gravel bed;
- (6) shovelling additional gravel into the trench;
- (7) levelling the gravel;
- (8) backfilling where needed;
- (9) installing voltage spikes;
- (10) installing copper ground cables;
- (11) installing barrier boards;
- (12) installing cable support blocks;
- (13) installing unistrut inserts;
- (14) installing cable-clips or clamps; and
- (15) placing trench lids to protect the cable.

5. The Board considers a variety of criteria to assist it in resolving work assignment disputes. Adam Clark is bound to the provincial ICI agreements with the Labourers and the IBEW. The IBEW Constitution and Collective Agreement claim all work with respect to "... ducts and raceways when part of distributing systems outside of buildings," The Labourer's agreement claims "all phases of on-site erection, finishing and caulking of precast concrete products ..." and "the work in connection with ..., concrete saws"

6. Adam Clark subcontracted the work in dispute to a subcontractor bound to the Labourers agreement. While Adam Clark did not participate in the proceeding it did file a pre-hearing brief indicating it supported and agreed with the submissions set out in the Labourers pre-hearing brief. At a Prejob/Mark-up meeting Adam Clark explained the project and assigned the installation of the Trenwa system to the Labourers and the work involving the laying of cables inside the completed ducting to the IBEW. The installation of the Trenwa duct system was subcontracted to G. L. Robbins Ltd.
7. The factors of skills and training and economy and efficiency do not favour the assignment of the work in dispute to either trade.
8. The evidence of area practice was limited. Both trades have performed the disputed work.
9. The Board does not find the July 13, 1948 agreement with respect to the "laying of wood fibre conduit underground for the carrying of electrical wires and cables" or the IJDB decisions of assistance.
10. Having considered all of the evidence, submissions and materials filed, the Board finds that the work in dispute was improperly assigned. The installation of the Trenwa duct in this dispute is for the exclusive purpose of housing electrical cables. It is not a multi purpose duct system. This work is part of the electrical installation and is another form of cable tray for the purpose of installing electrical cable. Therefore pursuant to section 93(1.2) of the Act, the Board directs that the disputed work shall be assigned to members of the IBEW, in Board Area No. 2.

1167-92-G Labourers' International Union of North America, Local 247, Applicant v. **Bellai Brothers Ltd.**, Responding Party v. Labourers' International Union of North America, Local 527, Intervenor

Construction Industry - Construction Industry Grievance - Practice and Procedure - Remedies - Whether certain job site in Kemptville falling within geographic area assigned to Labourers' union Local 247 under collective agreement - Board applying *M. Sullivan & Son* case and concluding that, under provincial agreement, no local union having exclusive jurisdiction over Kemptville - Employer not violating collective agreement when it hired from Local 527 rather than Local 247 - Grievance dismissed - Employer seeking costs - Board analyzing costs issue in detail and concluding that in section 126 proceedings, in absence of specific provision in collective agreement, Board has no jurisdiction to award legal costs as such - Board, however, directing Local 247 to reimburse employer for its share of section 126(4) expenses

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *F. B. Reaume* and *H. Kobryn*.

DECISION OF THE BOARD; January 31, 1994

I INTRODUCTION

1. This is a referral to the Board of a grievance in the construction industry, under section 126 of the *Labour Relations Act*.

2. After being adjourned three times by the parties, the grievance came on for hearing on July 29, 1993. Upon considering the materials filed and the representations of the parties at that hearing, the Board made an interim order as follows:

19. Upon hearing the representations of the parties, the Board declared that any contractor bound by the provincial collective agreement between the Labour Relations Bureau of the Ontario General Contractors Association; Ontario Masonry Contractors Association; Industrial Contractors Association of Canada; Waterproofing Contractors Association of Ontario; Concrete Floor Contractors Association of Ontario (the Employer Bargaining Agency), and the Labourers International Union of North America and the Labourers International Union of North America, Ontario Provincial Council, on behalf of its affiliate Local Unions 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089 (that is, the provincial agreement), which has work on a job site at a location which that provincial agreement does not specifically and clearly place in the geographic jurisdiction of either Local 247 or Local 527, may assign the work covered by the provincial agreement to members of either Local 247 or Local 527 in its sole discretion, until such time as this application is finally disposed of or the Board otherwise orders. If this interim order causes any problems, any interested party may apply to the Board, in writing, for directions, or request that the order be varied.

The Board then adjourned the matter *sine die* to a date or dates to be set by the Registrar as *may* be directed by the Board. Further, the Board directed that the parties file complete and fully particularized statements of "the facts upon which they intend to rely with respect to any assertion of any ambiguity in the provincial collective agreement, and how that ambiguity should be resolved, together with complete representations or argument in support of their respective positions." The parties were also advised that:

16. The parties should understand that the Board may find it appropriate to dispose of this application on the basis of the materials filed with the Board prior to and pursuant to the Board's directions herein without a further hearing or opportunity for them to be heard. Any party which desires a hearing should expressly request one and specify why a hearing is necessary.

3. The parties have filed extensive briefs and written replies. The applicant ("Local 247") has made a qualified request for a hearing as follows:

HEARING

36. Unless the Board is prepared to accept the evidence of Victor Claro and R. B. Warnington, referred to herein, and the alleged fact that both LOCAL 527 and BELLAI acknowledged to LOCAL 247 that Kemptville was in LOCAL 247's Geographical Area, the Board should convene a Hearing for the purpose, inter alia, of viva voce testimony.

The intervenor ("Local 527") does not request a hearing. The responding employer ("Bellai") has not specifically requested a hearing either.

4. Having reviewed the materials filed, the Board finds it appropriate to dispose of this matter on the basis thereof, without a further oral hearing. There is nothing in the materials before the Board which suggests that there is any other or additional evidence which needs to be adduced and the parties have made comprehensive written representations.

5. The grievance raises a question concerning the interpretation of the industrial, commercial and institutional ("ICI") provincial agreement between the Labour Relations Bureau of the Ontario General Contractors Association; Ontario Masonry Contractors Association; Industrial Contractors Association of Canada; Waterproofing Contractors Association of Ontario; Concrete Floor Contractors Association of Ontario (the Labourers' employer bargaining agency), and the Labourers' International Union of North America and the Labourers' International Union of

North America, Ontario Provincial District Council (the Labourers' employee bargaining agency) on behalf of its affiliated Local Unions 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059, 1081 and 1089 (the "Labourers' Provincial Agreement"), and more specifically whether the job site with respect to which the grievance herein was filed falls within the geographic area assigned to Local 247 under the agreement.

6. Local 247 claims that the job was in a geographic area it administers under the Labourers' Provincial Agreement and that Bellai therefore breached that agreement when it used members of Local 527 instead of members of Local 247 on the job. Bellai denies this. So does Local 527.

7. The job site in question was at the waste water treatment plant in Kemptville, Ontario. Local 247 asserts that there is a patent ambiguity in the provincial agreement which can be resolved by reference to other parts of the agreement and various extrinsic evidence, such that the correct interpretation of the agreement is that Kemptville is in the area assigned under the agreement of Local 247.

8. Bellai denies that there is any ambiguity in the provincial agreement and asserts that Kemptville is in an area which has not been assigned under the provincial agreement to any Local of the Labourers' International Union of North America. Bellai argues that Kemptville is in an "open area", in the same way that the Board found there to be open areas under the then Labourers' Provincial Agreement in *M. Sullivan & Son*, [1986] OLRB Rep. Aug. 1110. Bellai submits that both Local 247 and Local 527 are entitled to operate in the area in question under the provincial agreement, that it was therefore entitled to employ members of Local 527 at the job site, and that the grievance should therefore be dismissed.

9. Local 527's position is that there is no ambiguity in the Labourers' Provincial Agreement and that the part of Board Area 13 which is south of the Rideau River (which is where Kemptville is) is not under the jurisdiction of either Local 247 or Local 527 (that is, that it is an open area.) In the alternative, Local 527 asserts that that geographic area is within its geographic jurisdiction, whether or not there is an ambiguity in the provincial agreement.

II DECISION ON THE MERITS

10. It is a well-established rule of interpretation that where the words of a collective agreement are not ambiguous, only the words of the agreement can be used to interpret it. It is permissible to refer to extrinsic evidence as an aid to interpretation only in cases where the collective agreement contains a patent ambiguity or a latent ambiguity is alleged (see *Re Noranda Metal Industries and IBEW Local 2345*, (1984) 44 O.R. (2d) 529 (Court of Appeal); *Re International Union, United Automobile, Aerospace, and Agricultural Implement Workers, Local 1967 and McDonald Douglas Canada Ltd.*, (1984) 47 O.R. (2d) 78 (Divisional Court); *Ellis-Don Limited*, [1988] OLRB Rep. Dec. 1254; and see *Leitch Goldmines Ltd. et al. v. Texas Gulf Sulfur Co. (Inc.) et al.*, [1969] 1 O.R. 469).

11. In *M. Sullivan & Son*, *supra*, the Board treated the language in the then Labourers' Provincial Agreement dealing with Local Union jurisdiction as being ambiguous for the purpose of its decision, although in the result the Board found the extrinsic evidence submitted as an aid to interpretation unhelpful and ended up interpreting the agreement solely on the basis of the words used in it. In this case, no latent ambiguity is alleged and we are satisfied that although the language of the provincial agreement is not as clear as it might be, it is not patently ambiguous. The meaning of the agreement can be discerned from the words used in it. Accordingly, extrinsic evidence is not admissible in that respect.

12. In addition, Local 247 submits that:

26. ... at all material times BELLAI and LOCAL 527 were aware that LOCAL 527 could have no claim to jurisdiction over Kemptville, or any part of Board Area 13 other than Ottawa-Carleton and Lanark. They were also fully aware of LOCAL 247's claim to jurisdiction over Kemptville, and acknowledged same, permitting LOCAL 247 to rely upon such acknowledgment to its detriment. Neither BELLAI nor LOCAL 527 may now deny this acknowledgment. They are estopped from doing so. (See, e.g., *CN/CP Telecommunications* 4 L.A.C. (3d) 205.

Furthermore, in these circumstances, the reference to "Grenville" in the LOCAL 247 description in Schedule "B", and the LOCAL 247 Schedule to the PROVINCIAL AGREEMENT, are sufficient to preclude BELLAI from ignoring LOCAL 247's claims, and are sufficient to bind BELLAI to the proper interpretation of those claims, even if they were not estopped from denying same.

The equitable doctrine of estoppel can take several forms. In this case, Local 247 seeks to rely on the concept of estoppel by conduct, which has been applied by labour relations arbitrators.

13. Although it has been described in various ways, the basis for an estoppel exists where one party has, by its words or conduct, made a representation to another party which is intended to affect the legal relations between them, and on which the other party has acted to what would be its detriment if the party which made the representation was allowed to act as though the representation had not been made; that is, a party which has made a representation intended to be acted on and on which the party to whom the representation was made has acted to its detriment will not be allowed to deny the truth of its representation. For estoppel to lie, a representation must be clear and unqualified and must have influenced the conduct of the party alleging it.

14. In this case, Local 247 has not pleaded what we consider to be a clear and unequivocal representation by either Bellai or Local 527. Indeed, Local 247's pleadings suggest that the dispute regarding Local 247's geographic jurisdiction over Kemptville became apparent in May, 1992, before the work in issue in this case began, and has never been resolved. Even if everything alleged by Local 247 in that respect is true, it is not apparent that either Bellai or Local 527 ever expressly, by words or by conduct, accepted Local 247's jurisdiction. They may have acknowledged Local 247's claim, but they did not accept it.

15. Further, even if Bellai or Local 527 made a clear representation to Local 247 in that respect, there is nothing in Local 247's pleadings to indicate that it acted on that representation to its detriment. Local 247's pleadings contain a bald allegation of detrimental reliance but do not describe it, and it is not apparent what it is that Local 247 did or refrained from doing in reliance on the alleged representation. Nor is it apparent how the relations between the parties or Local 247's position in that respect were altered as a result of the representation alleged.

16. Accordingly, we are not satisfied that either Bellai or Local 527 are estopped from taking the positions they have in this proceeding.

17. The Labourers' Provincial Agreement provides that:

WHEREAS the Union, acting on behalf of the Local Unions whose names and numbers appear on the attached Schedule "A", and the E.B.A. wish to make a common Collective Agreement with respect to certain employees of the Employers engaged in construction as defined in Article 1 of this Collective Agreement and to provide for and ensure uniform interpretation and application in the administration of the Collective Agreement.

AND WHEREAS the E.B.A. recognizes the Union as the Collective Bargaining Agency on

behalf of the Local Unions specified in the attached Schedule "A" with respect to the employees of Employers covered in this Agreement.

IT IS EXPRESSLY AGREED AND DECLARED BY AND BETWEEN THE PARTIES HERETO AS FOLLOWS:

ARTICLE 1 - RECOGNITION

1.01 The E.B.A. recognizes the Union as the sole and exclusive bargaining agent for all construction labourers, including masons' or bricklayers' tenders, plasterers and plasterers' apprentices and all employees engaged in cement finishing, waterproofing or restoration work and all other construction employees engaged in the industrial, commercial and institutional sector of the construction industry in the province of Ontario, for whom the Union has bargaining rights.

1.02 The Union recognizes the E.B.A. (the several parties are listed on Schedule "C") as the sole and exclusive bargaining agent for all Employers whose employees are represented by the Union and for whom the Union has bargaining rights who are engaged in the industrial, commercial, and institutional sector of the construction industry in the Province of Ontario.

1.03 The Employer recognizes each Local Union as specified in the attached Schedule "A" to be the administrative party of this Collective Agreement for work performed within the geographical area and/or jurisdiction of the Local Unions as defined in Schedule "B" attached hereto.

1.04 This Agreement shall also apply to an Employer in all other sectors where the Union or any of its affiliated bargaining agents have bargaining rights in such other sectors for the employees of such Employer, provided that such Employer, may become signatory to the various Collective Agreements applicable in such other sectors.

ARTICLE 2 - UNION SECURITY, WORK JURISDICTION, ASSIGNMENT OF WORK, SUBCONTRACTING

2.01 The Employer agrees to employ only members in good standing of the Local Union specified in Article 1.03 for work covered by this Agreement.

2.02 As a condition of continuing employment, all employees shall maintain in good standing their membership in the Local Union.

• • •

SCHEDULE "B" GEOGRAPHIC REGIONS

Local 247

Area 29 is the Counties of Lennox, Addington, Frontenac and Leeds. Area 30 is Grenville County. Area 12 is Prince Edward County and the Townships of Lake Tudor, Grimsthorpe, Marmora, Madoc, Elzevir, Rawson, Huntingdon, Hungerford, Sydney, Thurlow and Tyendinaga in the County of Hastings. The Townships of McClure, Wicklow, Bangor, Herschel, Monteagle, Carlow, Faraday, Danganon, Mayo, Wollaston, Limerick and Cashel being all of Hastings County outside Area 12.

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Local 527

The Regional Municipality of Ottawa-Carleton, The Counties of Lanark, Russell, Prescott, Dundas, Stormont, Glengarry and Renfrew.

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LOCAL UNION SCHEDULE FOR LOCAL 247 - KINGSTON**ARTICLE 1 - RECOGNITION**

1.01 The Employer recognizes Local 247 as the exclusive administrative party to this Agreement for employees working in and out of the countries and municipalities of this schedule which shall be zoned as follows: Zone I - Board Area 29 - the Counties of Lennox, Addington, Frontenac and Leeds; Zone II - Board Area 30 - Grenville County; Zone III - Board Area 12 - Prince Edward County and the Townships of Lake Tudor, Grimsthorpe, Marmora, Madoc, Elzevir, Rawson, Huntingdon, Hungerford, Sydney, Thurlow, Murray, Trenton and Tyendinaga in the County of Hastings; Zone IV - the Townships of McClure, Wicklow, Bangor, Herschel, Monteaigle, Carlow, Faraday, Danganon, Mayo, Wollaston, Limerick and Cashel in the County of Hastings.

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ARTICLE 3 - HOURS OF WORK AND OVERTIME RATES

3.01 (a) In Board Area 29 except the County of Leeds but including the Townships of Rear of Leeds and Lansdowne and the Front of Leeds and Lansdowne and except labourers working on masonry, tile, terrazzo and marble, the hours of work shall be thirty-six (36) hours per week. The regular working day which maybe varied by mutual consent of both parties, shall be eight (8) hours between 7:30 a.m. and 5:00 p.m. on Mondays, Tuesdays, Wednesdays, Thursdays and four (4) hours between 7:30 a.m. and 12 noon on Fridays.

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LOCAL UNION SCHEDULE FOR LOCAL 527 - OTTAWA

For the Territorial Jurisdiction of Labourers' International Union of North America, Local 527 (hereinafter called "Local 527").

ARTICLE 1 - RECOGNITION

1.01 The Employer recognizes Local 527 as the exclusive administrative party of the Collective Agreement fall all occupations herein covered under Appendix "A" in its employ, working in or out of Zones 1, 2, and 3 of this schedule and for whom Local 527 has bargaining rights.

18. We agree with the approach, reasoning and conclusions of the Board in *M. Sullivan & Son, supra*, which we have already noted is a previous case dealing with Local 247's geographic jurisdiction and the proper interpretation to be given to the Labourers' Provincial Agreement in that respect. That is, it is the Labourers' Provincial Agreement which defines the exclusive geographic jurisdiction of each local union under it such that it is the description in Schedule "B" which determines each local's jurisdiction for purposes of administering the collective agreement, and any area not specifically identified as being within a local union's jurisdiction is not within its exclusive jurisdiction.

19. The Board has established thirty-two geographic areas in the Province which are used in determining and describing bargaining units in the construction industry. The current Board area descriptions have been in place since January 1, 1982. Board Areas 12, 13, 14, 15, 29, 30 and 31 are defined as follows:

Board Area 12

Prince Edward County, the geographic Townships of Lake, Tudor and Grimsthorpe and all lands south thereof in the County of Hastings, and the geographic Townships of Percy and Cra-mahe and all lands east thereof in the County of Northumberland.

Board Area 13

The County of Lanark, the geographic Townships of South Crosby, Bastard, Kitley, Wolford, Oxford (on Rideau) and South Gower and all lands north thereof in the United Counties of Leeds and Grenville.

Board Area 14

The County of Renfrew.

Board Area 15

The Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell.

Board Area 29

The County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville.

Board Area 30

The geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville.

Board Area 31

The United Counties of Stormont, Dundas and Glengarry.

20. The difficulty in interpreting the Labourers' Provincial Agreement in this case results from an attempt to describe Local 247's jurisdiction for purposes of the agreement by using a combination of references to Board Areas (29 and 30), local government divisions (counties) and subdivisions (geographic townships). The description of Local 527's geographic jurisdiction does not pose a problem. It is described as being the Regional Municipality of Ottawa-Carleton and the Counties of Lanark, Russell, Prescott, Dundas, Stormont, Glengarry and Renfrew - which happens to coincide with the combined descriptions of Board Areas 14, 15, 31 and that part of Board Area 13 north of the Rideau River. That is, that part of Board Area 13 which is in the United Counties of Leeds and Grenville is *not* in Local 527's jurisdiction. The Town of Kemptville is in the Township of Oxford (on Rideau) in the County of Grenville and is therefore outside of Local 527's exclusive jurisdiction. Consequently, the job site in issue herein was not in Local 527's exclusive jurisdiction.

21. In the description of Local 247's geographic jurisdiction the word "Area" is clearly intended to refer to a "Board Area". However, although the descriptions purport to describe what the Board Areas are, these descriptions do not match the actual ones. For example, the actual Board Area 29 is "the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville" not "the Counties of Lennox, Addington, Frontenac and Leeds" which the provincial agreement states it "is"; that is, it does not include all of the County of Leeds. Similarly, the actual Board Area 30 is "the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville" not Grenville County which the provincial agreement states it "is" that is, Board Area 30 includes only part of Grenville County.

22. Neither the employer or employee bargaining agencies, nor any of their constituent

employers or affiliated bargaining agents respectively, can change the Board Areas established by the Board. Accordingly, the reference to a Board Area followed by a listing of local government political administrative divisions must mean that only that part of the county or other local government division which falls within the particular Board Area is included in a Local Union's jurisdiction. In the case of Local 247, only that part of the County of Leeds which is in Board Area 29 or Board Area 30 (the Township of Elizabethtown is the only portion of the County of Leeds in Board Area 30), and only that part of the County of Grenville which is in Board Area 30 are included within its geographic jurisdiction. This is consistent with the situation with respect to Board Area 12 which, pursuant to Schedule "B" of the provincial agreement has clearly been divided up between Local 247 and Labourers' International Union of North America, Local 597 ("Local 597"). Accordingly, only that part of Board Area 12 specified; that is, Prince Edward County and the listed geographic townships of the County of Hastings (together with that part of the County of Hastings outside of Board Area 12) are under Local 247's jurisdiction.

23. Under the Labourers' Provincial Agreement, Local 247's geographic jurisdiction is therefore the Counties of Hastings, Prince Edward, Lennox, Addington, Frontenac, the geographic Townships of Rear of Leeds and Lansdowne, Front of Leeds and Lansdowne, Rear of Yonge and Escott, Front of Escott, Front of Yonge, and Elizabethtown in the County of Leeds, and the geographic Townships of Augusta and Edwardsburg in the County of Grenville. We note that the Township of Murray in the County of Northumberland is listed in Article 1 of Local 247's schedule. However, that geographic township is listed in Schedule "B" as part of Local 597's geographic jurisdiction. It is not listed in the Schedule "B" description of Local 247's geographic jurisdiction. Nor is any other part of the County of Northumberland. In these circumstances, Schedule "B" must prevail. We therefore find that the geographic Township of Murray in the County of Northumberland is *not* under Local 247's jurisdiction.

24. The geographic Township of Trenton in the County of Hastings is not listed in the Schedule "B" description of Local 247's jurisdiction. It is, however, listed in Article 1 of the local union schedule for Local 247 and is not found in the description of any other local union's geographic jurisdiction, and we find it is included in Local 247's territory.

25. Consequently, the geographic Townships of South Crosby, Bastard, Kitley and all land north thereof in the County of Leeds (that is, South Elmsley, South Burgess and North Crosby), and the geographic Townships of Wolford, Oxford (on Rideau) and South Gower in the County of Grenville are *not* included in Local 247's exclusive geographic jurisdiction. In the result, Kemptville and the job site that is the subject of this grievance is not in Local 247's exclusive jurisdiction for purposes of the Labourers' Provincial Agreement.

26. It was part of Local 247's position that the Board should not find that the parts of the Counties of Leeds and Grenville in issue have been placed under neither Local 247's or Local 527's exclusive jurisdiction. However, it is quite apparent that it is possible for parties to omit parts of the province from the exclusive jurisdiction of any Local Union, leaving the master portions of the agreement to apply, which would result in leaving an employer's discretion in terms of assigning work under the agreement unfettered in that respect. That was precisely the conclusion arrived at (correctly in our view) by the Board in *M. Sullivan & Son, supra*. Indeed, it was in response to the Board's decision in that case that the geographic Townships of McClure, Wicklow, Bangor, Herschel, Monteagle, Carlow, Faraday, Danganon, Mayo, Wollaston, Limerick and Cashel in the County of Hastings were added to the Schedule "B" geographic description of Local 247's jurisdiction under the Labourers' Provincial Agreement, and Article 1 of the local union schedule for Local 247. (We note that contrary to what is indicated in Schedule "B", the Townships of Wollaston, Limerick and Cashel *are* in Board Area 12.)

27. Further, on the material before the Board it is apparent that both Local 247 and Local 527 have claimed and exercised jurisdiction in the disputed area.

28. Finally it is apparent that even the Labourers' International Union of North America does not and cannot say that the parts of the Counties of Leeds and Grenville in question herein are in either Local 247's or Local 527's geographic jurisdiction, either for purposes of the provincial agreement or otherwise. By letter dated July 29, 1993, the International wrote to Local 247 that: "the disputed geographic area of the Smith Falls area, separating Local Union's 527 and 247 is separated by the river and is in fact Local 247's geographic jurisdiction." Subsequently, by letter dated September 14, 1993, the International wrote, with respect to the same disputed area, that "... it is not clear that Local 247 has had the jurisdiction in this area ... it is clear [sic] why this area was labeled as an obvious grey [sic] area" and indicated that the matter has yet to be resolved.

29. In this case, the Board cannot decide for the parties, or for the employer and employee bargaining agencies, what the geographic jurisdiction of Locals 247 and 527 *should* be under the Labourers' Provincial Agreement. The Board can only interpret the agreement and determine what their respective geographic jurisdictions *are*.

30. Because no Local Union of the Labourers' International Union of North America has exclusive jurisdiction over geographic area which includes Kemptonville, and therefore no local union schedule mandatorily applies, an employer, Bellai in this case, could choose the local union it wished to hire from. Bellai chose Local 527 in this case, which we are satisfied it was entitled to do. There has therefore been no breach of the Labourers' Provincial Agreement and this grievance must be dismissed. The interim order made as aforesaid is also vacated.

31. The resolution of the geographic issue raised herein is left to Local's 247 and 527, the Labourers' International Union of North America, and the employer and employee bargaining agencies to resolve.

III COSTS

32. This leaves only the issue of costs. The Board reserved its decision with respect to Bellai's request for costs at the July 29, 1993 hearing. Bellai has maintained its request for costs with respect to that hearing and it is implicit in its written submissions that Bellai is also seeking its costs of the proceeding as a whole. The costs issue was clearly identified and the parties have addressed it, though not particularly extensively, in their representations.

33. Bellai's request for "costs" potentially raises several questions. First, can the Board award costs at all; that is, does the Board have jurisdiction to award costs? Second, if the Board does have such a jurisdiction, what approach can or should it take; that is, what are the limitations on the Board's jurisdiction with respect to costs and what are the appropriate policy considerations? Third, if it can, should the Board award costs in this case, either as requested by Bellai or at all? Of course, if the answer to the first question is negative it is not necessary to address the others.

34. The Board's jurisprudence demonstrates a general reluctance to address either of the first two questions directly. Where the issue of costs has been addressed, the Board's general approach has been to assume, without deciding, that the Board has an unspecified costs

jurisdiction, and, in most cases, the Board has declined to award costs in a particular case for policy reasons. In the result, the Board has developed a practice of not awarding costs. The Board dis-

position of a request for costs in *Repac Construction & Materials Limited*, [1976] OLRB Rep. Oct. 610 is representative of the Board's general approach:

10. The request for costs also goes against the grain of this Board's previous practice. Previous decisions not only indicate that the Board has no general practice of awarding costs, but also raise the question of whether the Board has any procedural jurisdiction to make an order for costs. See *Dow Jones Ltd.*, [1970] OLRB Rep. June 382; *Joffre Lapointe & Sons Ltd.*, [1971] OLRB Rep. Sept. 621. On some occasions, however, the Board has made the payment of costs a condition for the granting of an adjournment. See *Metropolitan Toronto Apartment Builders' Association et al.*, [1970] OLRB Rep. Nov. 846; *R.T. Construction*, [1971] OLRB Rep. June 342. From these cases, it can be seen that the Board has not attempted to exercise any general power to award costs. This approach might be attributed to the fact that the Board has not been given any express power to award costs. It should be noted, however, that the general procedural jurisdiction, conferred by both section 91(2) of *The Labour Relations Act* and section 23 of *The Statutory Powers Procedure Act*, may be wide enough to encompass the power to award costs. Jurisdictional uncertainty, therefore, is not a particularly compelling explanation of the Board's reluctance to award costs. In our opinion, there is a much better reason for adopting a general practice of not awarding costs. The underlying purpose of *The Labour Relations Act*, as set out in its preamble, is to further harmonious relations between employers and employees through the collective bargaining process. The purpose is not well served by a procedure that usually requires the identification of a winner and a loser. The application of such a procedure, moreover, would be time-consuming, distracting the Board from its primary task of facilitating collective bargaining.

The awarding of costs, therefore, should not be extended beyond the situation where a party is being compensated for the expenses that would result from an adjournment to convenience another party. To extend this procedure any further would introduce an unnecessarily punitive element into the Board's procedures. The request for costs are denied.

35. However, there have been exceptions. The Board has awarded what it has called "costs" in several cases. As the Board noted in *Repac Construction*, *supra*, the Board has made the payment of costs as condition of the granting of a contested adjournment (an approach which seems to have received a kind of judicial approval in *Re Her Majesty the Queen in Right of Ontario and Ontario Public Service Employees Union and The Grievance Settlement Board*, (Taffinder and the Ministry of Correctional Services), April 13, 1984, Ontario Divisional Court unreported, where the Court stated:

In these circumstances, one alternative the Board could have pursued would have been to require that the Crown compensate the grievor for all expenses incurred in connection with the abortive hearing. To refuse the adjournment outright and to proceed, as it did, effectively to deal with the grievance, was to ignore completely the principle of fairness to which the Board's discretion must always be subject.)

The Board has awarded costs in a section 126 proceeding involving a collective agreement which required a delinquent employer to pay legal or other costs of collecting monies owing with respect to bargaining unit employees (*Rocco D'Andrea*, [1987] OLRB Rep. July 986). The Board has also awarded costs to a successful applicant as part of the "make-whole" order (*Academy of Medicine*, [1977] OLRB Rep. Dec. 783; *Suzanne Hebert-Vaillant*, [1981] OLRB Rep. June 623).

36. The Board has awarded costs in so few cases that the cases in which it has done so are the exception rather than the rule. Even when the Board has awarded costs, the Board has stressed the extraordinary nature of such an award, and has either not commented on its jurisdiction to do so, or has done so only in general terms, or has indicated it was doing so under the Board's remedial authority under what is now section 91(4) of the Act. Further, the Board has always stressed that its general practice is not to award costs. When the Board has rejected a request for costs it has usually assumed, for the purpose of its decision, that it has the jurisdiction to do so but has

concluded that costs were not appropriate in the particular case, thereby leaving the costs door open, so to speak.

37. It is difficult to distinguish between the cases in which the Board has awarded “costs”, in whatever form, and those in which the Board has refused to do so. Further, the Board has expressed some doubts regarding its jurisdiction to award “costs”. In *Repac Construction, supra*, the Board referred to a “jurisdictional uncertainty” but denied the request for costs on policy grounds. In *Joe Arban Contractor Ltd.* [1983] OLRB Rep. Apr. 547, the Board’s decision reflects some doubt concerning the Board’s jurisdiction to award costs outside of its general or remedial jurisdiction or with respect to adjournments. In *Fitzhenry & Whiteside*, [1987] OLRB Rep. Apr. 504, the Board said that:

... Were it in the power of the Board to award costs [to a successful respondent or against an unsuccessful applicant] we would certainly do so. However, we do not think that we can award costs, but we can certainly dismiss both the application and complaint ...”

In *Gerald Lecuyer*, [1987] OLRB Rep. April 529, the Board observed that:

This Board has repeatedly said that if it does have the power to award costs to a successful complainant, it would be inappropriate to exercise that power where there is no corresponding power to award costs against an unsuccessful complainant ...

[emphasis added]

38. There is good reason to doubt the Board’s jurisdiction to award costs as such. In the legal meaning of the term, costs refers to an award made in favour of a successful litigant, payable by the loser at the conclusion of the proceeding, as an indemnity for allowable expenses incurred with respect to the proceeding. In both judicial and quasi-judicial settings, costs as such are reciprocal and fault-based in the sense that the loser indemnifies the winner, in a general way, for its litigation expenses (see, for example, *Bell Canada v. Consumers Association of Canada et al.*, [1986] Admin L.R. 205 (Supreme Court of Canada), and see, *Re Hamilton-Wentworth and Save the Valley Committee et al.*, (1985) 51 O.R. (2d) 23 (Ontario Divisional Court)). Except where specifically authorized by statute, costs are not assessed as a penalty, or for reasons unconnected with indemnification.

39. Superior Courts in Ontario assert an inherent costs jurisdiction (*Apotex Inc., v. Egis Pharmaceuticals*, (1991) 4 O.R. (3d) 321; *Re Sturmer and Beaverton*, (1912) 2 D.L.R. 501; and see also *Kendall v. Hunt*, (1979) 106 D.L.R. (3d) 277 (British Columbia Court of Appeal) which describes the situation in British Columbia where prior to 1969 British Columbia Courts awarded costs without specific statutory authority on the basis of inherent jurisdiction said to be recognized in various statutes and the British Columbia Rules of Practice). Certainly, the Courts of Chancery (but not the Common-law Courts) had such an inherent jurisdiction (see, generally, Mark M. Orkin, Q.C., *The Law of Costs* second edition ((1993), Canada Law Book Inc., Aurora)). However, the primary jurisdiction of Ontario courts to award costs is rooted in the *Courts of Justice Act* and the Ontario Rules of Civil Procedure. Section 131(1) of the *Courts of Justice Act* provide that:

131.-(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

Rule 57 of the Ontario Rules of Civil Procedure provides:

Factors of Discretion

57.01(1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs,

the court may consider, in addition to the result in the proceeding and any offer to settle made in writing,

- (a) the amount claimed and the amount recovered in the proceeding;
- (b) the apportionment of liability;
- (c) the complexity of the proceeding;
- (d) the importance of the issues;
- (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
- (f) whether any step in the proceeding was;
 - (i) improper, vexatious or unnecessary, or
 - (ii) taken through negligence, mistake or excessive caution;
- (g) a party's denial of or refusal to admit anything that should have been admitted;
- (h) whether it is appropriate to award any costs or more than one set of costs where a party,
 - (i) commenced separate proceedings for claims that should have been made in one proceeding, or
 - (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different solicitor; and
- (i) any other matter relevant to the question of costs.

Costs Against Successful Party

(2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case.

Costs may be Fixed or Assessed

(3) In awarding costs, the court may fix all or part of the costs with or without reference to the Tariffs, instead of referring them for assessment, and where the costs are not fixed, they may be assessed under Rule 58.

Authority of Court

(4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*,

- (a) to award or refuse costs in respect of a particular issue or part of a proceeding;
- (b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding; or
- (c) to award all or part of the costs on a solicitor and client basis.

40. As the Board has itself observed, the *Labour Relations Act* gives no express authority to award costs, either to the Board or to boards of arbitration constituted under the Act. Nor does any other legislation. There is nothing in any of the extensive amendments which came into effect on January 1, 1993, following a lengthy and comprehensive review of the Act, which changed this. In contrast, the Legislature has expressly given other administrative tribunals and arbitrators under the *Arbitrations Act* the authority to award costs. For example:

(a) subsections 7(4)-(7) of the *Consolidated Hearings Act* give a joint board the authority to award costs as follows:

- (4) A joint board may award the costs of a proceeding before the joint board.

(5) A joint board that awards costs may order by whom and to whom the costs are to be paid.

(6) A joint board that awards costs may fix the amount of the costs or direct that the amount be assessed, the scale according to which they are to be assessed and by whom they are to be assessed.

(7) In awarding costs, in respect of hearings in relation to which public notice was first given after the 1st day of April, 1989, a joint board is not limited to the considerations that govern awards of costs in any court.

This is in addition to subsection 7(3) which provides:

(3) Subject to this Act and the regulations, a joint board may determine its own practice and procedure.

(b) sections 14 and 28 of the *Ontario Energy Board Act* provide that:

14. The Board for the due exercise of its jurisdiction and powers and otherwise for carrying into effect this or any other Act has all such powers, rights and privileges as are vested in the Ontario Court (General Division) with respect to the amendment of proceedings, addition or substitution of parties, attendance and examination of witnesses, production and inspection of documents, entry on and inspection of property, enforcement of its orders and all other matters necessary or proper therefor.

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28.-(1) The costs of and incidental to any proceeding before the Board are in its discretion and may be fixed in any case at a sum certain or may be taxed.

(2) The Board may order by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.

(3) The Board may prescribe a scale under which such costs shall be taxed.

(4) In this section, the costs may include the costs of the Board, regard being had to the time and expenses of the Board.

(5) In awarding costs, the Board is not limited to the considerations that govern awards of costs in any court.

(c) section 97 of the *Ontario Municipal Board Act* provides that:

97.-(1) The costs of and incidental to any proceeding before the Board, except as herein otherwise provided, shall be in the discretion of the Board, and may be fixed in any case at a sum certain or may be assessed.

(2) The Board may order by whom and to whom any costs are to be paid, and by whom the same are to be assessed and allowed.

(d) section 24 of the *Ontario Highway Transport Board Act* provides that:

24.-(1) The costs of and incidental to any proceeding before the Board are in its discretion and may be fixed in any case at a sum certain or may be taxed.

(2) The Board may order by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.

(e) section 41 of the *Human Rights Code* provides, with respect to Boards of Inquiry, that:

41.-(1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part 1 has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the board may, by order,

- (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
- (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000, for mental anguish.

(2) Where a board makes a finding under subsection (1) that a right is infringed on the ground of harassment under subsection 2(2) or subsection 5(2) or conduct under section 7, and the board finds that a person who is a party to the proceeding,

- (a) knew or was in possession of knowledge from which the person ought to have known of the infringement; and
- (b) had the authority by reasonably available means to penalize or prevent the conduct and failed to use it,

the board shall remain seized of the matter and upon complaint of a continuation or repetition of the infringement of the right the Commission may investigate the complaint and, subject to subsection 36(2), request the board to re-convene and if the board finds that a person who is a party to the proceeding,

- (c) knew or was in possession of knowledge from which the person ought to have known of the repetition of infringement; and
- (d) had the authority by reasonably available means to penalize or prevent the continuation or repetition of the conduct and failed to use it,

the board may make an order requiring the person to take whatever sanctions or steps are reasonably available to prevent any further continuation or repetition of the infringement of the right.

(3) Where a board of inquiry for any reason is unable to exercise its powers under this section or section 39, the Commission may request the Minister to appoint a new board of inquiry in its place.

(4) Where, upon dismissing a complaint, the board of inquiry finds that,

- (a) the complaint was trivial, frivolous, vexatious or made in bad faith; or
- (b) in the particular circumstances undue hardship was caused to the person complained against,

the board of inquiry may order the Commission to pay to the person complained against such costs as are fixed by the board.

(5) The Board of inquiry shall make its finding and decision within thirty days after the conclusion of its hearing.

(f) section 32 of the *Expropriations Act* provides that:

32.-(1) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Board and the amount awarded by the Board is 85 per cent, or more, of the amount offered by the statutory authority, the Board shall make an order directing the statutory authority to pay the reasonable legal, appraisal and other costs actually

incurred by the owner for the purposes of determining the compensation payable, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to an assessment officer who shall assess and allow the costs in accordance with this subsection and the tariffs and rules prescribed under clause 44(d).

(2) Where the amount to which an owner is entitled upon an expropriation or claim for injurious affection is determined by the Board and the amount awarded by the Board is less than 85 per cent of the amount offered by the statutory authority, the Board may make such order, if any, for the payment of costs as it considers appropriate, and may fix the costs in a lump sum or may order that the determination of the amount of such costs be referred to an assessment officer who shall assess and allow the costs in accordance with the order and the tariffs and rules prescribed under clause 44(d) in like manner to the assessment of costs awarded on a party and party basis.

(g) sections 20, 21, 22, 27 and section 12 of the Schedule (under section 5) of the *Arbitrations Act* provide that:

20. Where at a meeting of arbitrators of which due notice has been given no steps are taken in consequence of the absence of a party, or of a postponement at the request of a party, the arbitrators shall make up an account of the costs of the meeting, including the proper charges for their own attendance and that of any witnesses and of the counsel or solicitor of the party present and not desiring the postponement, and, unless under the special circumstances of the case they think that it would be unjust so to do, they shall charge the amount thereof, or of the disbursements, against the party in default or at whose request the postponement is made, and the last mentioned party shall pay the same to the other party, whatever may be the event of the reference, and the arbitrators shall, in the award, make any direction necessary for that purpose, and the amount so charged may be set off against, and deducted from, any amount awarded in that party's favour.

21.-(1) A party to an arbitration is entitled to have the costs thereof, including the fees of the arbitrators, or such fees alone, assessed by one of the assessment officers of the court upon an appointment that may be given by the officer for that purpose on the filing of an affidavit setting forth the facts.

(2) An assessment of the fees of the arbitrators may be had upon an appointment given at the instance of the arbitrators or any of them upon a like affidavit.

22.-(1) The assessment officer shall in no case, except as provided in section 18, assess higher fees than are prescribed to the arbitrators but, upon reasonable grounds, he or she may reduce the fees to any amount below the maximum prescribed, but not below the minimum, having regard always to the length of the arbitration, the value of the matter in dispute, and the difficulty of the questions to be decided, and the fees to be allowed to solicitors and counsel shall be as nearly as may be similar to the fees allowed upon a reference in the court, the scale to be determined by the assessment officer having regard to the value of the matter in dispute, but he or she shall not assess more than one counsel fee to either party.

(2) The assessment officer may assess a reasonable sum for preparing the award.

(3) An appeal may be had from the assessment in the same manner as from an assessment officer's certificate of assessment of costs in an action.

(4) The assessment officer and the judge upon appeal from assessment have the power to reduce fees payable to the arbitrator and to counsel and solicitors where the arbitration has been unduly prolonged.

27. An order made under this Act may be made on such terms as to costs or otherwise as the authority making the order thinks just.

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12. The costs of the reference and award are in the discretion of the arbitrators or umpire, who may direct to and by whom and in what manner those costs or any part thereof shall be paid.

(see also, section 11(2)(i) of the Alberta *Labour Relations Code* which enables the Alberta Board to award costs against the party initiating a proceeding or the party responding where the Board considers the proceeding or response “trivial, frivolous or vexatious”).

41. The Ontario Labour Relations Board has been created by the *Labour Relations Act*. As a creature of statute, the Board has no inherent jurisdiction; it has only the powers conferred upon it by statute. (Though this seems to be a rather trite proposition, useful reference can be made, specifically with respect to the issue of costs, to *Regional Municipality of Hamilton-Wentworth v. Hamilton-Wentworth Save the Valley Committee et al.* (1985) 15 Admin L.R. 86 (Ontario Divisional Court), where, at pages 96 and 97, the court held that:

This Board [a joint board constituted under the *Consolidated Hearings Act*] being creature of statute can only exercise the powers conferred upon by the enabling of legislation.

And on the issue of costs, the court in that case went on to add that:

... from the earliest of times it has been recognized that the power to award costs must be found in a statute.)

(See also *Ontario Energy Board*, [1985] 51 O.R. (2d) 333 (Ontario Divisional Court)).

42. Subsections 91(4), 104(13), and 105(1) and (2) of the *Labour Relations Act* provide that:

91.(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting, the generality of the foregoing may include, despite the provisions of any collective agreement, any one or more of,

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of;
- (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate instead of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally; or
- (d) an order, when a party contravenes section 15, settling one or more terms of a collective agreement if the Board considers that other remedies are not sufficient to counter the effects of the contravention.

104.(13) The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceeding to present their evidence and to make their submissions.

105.-(1) The Board shall exercise the powers and perform the duties that are conferred or imposed upon it by or under this Act.

(2) Without limiting the generality of subsection (1), the Board has power,

- (a) to require any party to furnish particulars before or during a hearing;
- (a.1) to require any party to produce documents or things that may be relevant to a matter before it and to do so before or during a hearing.
- (a.2) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce the documents and things that the Board considers requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases;
- (b) to administer oaths and affirmations;
- (c) to admit and act upon such oral or written evidence as it considers proper, whether admissible in court or not.
- (d) to require persons or trade unions, whether or not they are parties to proceedings before the Board, to post and to keep posted upon their premises in a conspicuous place or places, where they are most likely to come to the attention of all persons concerned, any notices that the Board considers necessary to bring to the attention of such persons in connection with any proceedings before the Board;
- (e) to enter any premises where work is being or has been done by the employees or in which the employer carries on business, whether or not the premises are those of the employer, and inspect and view any work, material, machinery, appliance or article therein, and interrogate any person respecting any matter and post therein any notice referred to in clause (d);
- (f) to enter upon the premises of employers and conduct representation votes during working hours and give such directions in connection with the vote as it considers necessary;
- (g) to authorize any person to do anything that the Board may do under clauses (a) to (f) and to report to the Board thereon;
- (h) to authorize the chair or a vice-chair to inquire into any application, request, complaint, matter or thing within the jurisdiction of the Board, or any part of any of them, and to report to the Board thereon;
- (i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing the employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application;
- (j) to determine the form in which evidence of membership or application for membership or of objection to certification of a trade union shall be filed or presented on an application for certification and to refuse to accept any evidence not filed or presented in that form;
- (j.1) to determine, on an application for a declaration terminating bargaining rights, the form in which and the time as of which evidence shall be filed or presented concerning employees who no longer wish to be represented by a

trade union and to refuse to accept any evidence not filed or presented in that form or by that time.

- (k) to determine the form in which and the time as of which evidence of representation by an employers' organization or of objection by employers to accreditation of an employers' organization or of signification by employers that they no longer wish to be represented by an employers' organization shall be presented to the Board in an application for accreditation or for a declaration terminating bargaining rights of an employers organization and to refuse to accept any evidence of representation or objection or signification that is not presented in the form and as of the time so determined.
- (l) to determine the form in which and the time as of which any party to a proceeding before the Board must file or present any thing, document or information and to refuse to accept any thing, document or information that is not filed or presented in that form or by that time;
- (m) to attach terms or conditions to any order.

Section 23(1) of the *Statutory Powers Procedure Act* provides that:

23.-(1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.

43. Except where legislation specifically so provides, or arguably in extraordinary circumstances, costs are not an instrument for procedural control. In any event, the authority to award costs is not derived from the authority administrative tribunals are given to control their own processes. In *Reference Re National Energy Board Act*, [1986] 19 Admin L.R. 301, the Federal Court of Appeal expressly held that subsection 10(3) [now section 11(3)] of the *National Energy Board Act*, which is analogous to subsections 104(13) and section 105(2), in the Ontario *Labour Relations Act*, does not empower the National Energy Board to award costs. (Subsection 10(3) [now subsection 11(3)] of the *National Energy Board Act* read (and now reads):

The Board has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, enforcements of its orders, the entry upon an inspection of property and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges are vested in the Superior Court of Record.)

Consequently, the fact that the Board is the master of its own procedure does not confer a jurisdiction to award costs. In addition, the specificity with which the Board's powers have been enumerated in the *Labour Relations Act*, and the omission of any reference to costs in these, suggests that the Board has no costs jurisdiction.

44. Further, it is not apparent that the Board requires the power to award costs with respect to either procedural matters or the merits of matters which come before it. For practical purposes, the Board has always operated without any perceived need to award costs. There is nothing in the Board's history or jurisprudence which suggests that the Board requires the jurisdiction to award costs in order to fulfill its statutory mandate or obligations. There is nothing which indicates that the awards of costs which have been made had any effect on the labour relations of the parties involved, or on the labour relations in Ontario in any general way. Nor is there any indication that the Board's practice of not awarding costs has had any labour relations effect, either in specific cases or generally.

45. We have already noted that the Board has awarded costs as part of a "make-whole" remedy in the exercise of the Board's remedial power and discretion under subsection 91(4) of the

Labour Relations Act. That approach has been adopted in British Columbia. In *Delta Optimist*, [1980] 2 Can. LRBR 227, the then British Columbia Labour Relations Board held that:

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Since this Board's authority to award compensation or provide any other remedies similarly hinges upon a finding of a violation of the Code (see Sections 8(4) and 28 (1), [now sections 14 and 133 respectively] a policy of awarding legal costs would suffer from the weakness identified by the Ontario Board; a respondent who successfully defends against a complaint in circumstances such as, for example, a frivolous allegation, could not be awarded legal costs.

In support of the Union's claim for compensation for its litigation expenses, counsel for the Union points out that the Ontario Board did not preclude the possibility that legal costs might be ordered in some cases. Upon noting its unwillingness to grant legal costs, the decision nevertheless states that: "This policy may be reviewed by the Board from time to time". Counsel for the Union, moreover, provides a partial answer to the concern expressed by the Ontario Board by emphasizing this Board's express authority to "reject the complaint at any time" if it is "without merit" (see Sections 8(5) and 28(4)). But that is only a partial answer inasmuch as a respondent may incur substantial legal costs to demonstrate that a complaint is without merit.

There are, as well, other reasons that the Board is reluctant to award costs except in extreme circumstances such as those warranting a make whole remedy. Since the Board has no authority to make an order for compensation in relation to contraventions of Part V of the Code, any policy respecting legal costs could not be consistently and uniformly administered in relation to all complaints and applications under the Code. In addition, we do not take the Union to be arguing that legal costs should be awarded in all matters before the Board and thus any policy with respect to costs would require that distinctions be drawn between those cases where an order for costs would be warranted and those where it would not. It is hard to imagine a judgment less amenable to predictable, objective standards. Furthermore, a policy of granting legal costs would necessitate an administrative procedure or apparatus to review the reasonableness of the legal costs claimed and that exercise is not conveniently achieved by the resources available to the Board; it is undertaken at this time only in those extreme cases where a make whole remedy is appropriate. Finally, while the Union has undeniably been put to considerable cost and expense by reason of the Respondents' strategy in this case, compensation for litigation expenses would not remedy the real harm inflicted by the unfair labour practices committed by the Respondents or the aggravated effect of those unfair labour practices.

• • •

In *Scott v. B.C. Government Employees' Union* [1992] No. C104/92, Industrial Relations Council (as it then was), it held that:

There is no question that legal costs and related expenses are within the ambit of the Council's jurisdiction under Section 8 and 28 to fashion remedies which respond appropriately to the dispute between the parties.

A review of the relevant jurisprudence reveals that, like all remedies the Council may award, legal costs are, first and foremost, discretionary, a function of policy, and only awarded where the Council finds a breach of the Act. Second, this remedy, like all others, must fall within the governing notion of remedies being remedial, not punitive. Third, legal costs may be awarded where traditional remedies have proven ineffective. Fourth, if they are going to be awarded at all, it is normally in cases where the conduct complained of has been particularly egregious. Fifth, the most usual circumstances in which legal costs are awarded are Section 7 applications where different considerations apply.

Where the Council upholds an individual's Section 7 complaint of unfair representation by a trade union, the reasoning is, generally speaking, that the individual union member and the union have divergent and conflicting interests. Independent counsel for the individual is perceived as the best way to protect the individual's interests. The equities of the situation demand

that lack of financial resources not prevent the individual from pursuing rights under the Act or be financially penalized for doing so: consequently, a make-whole order is made.

Applying these principles to the case at hand, I find first, that an order for legal cost is not necessary in order to respond appropriately to the dispute between the parties. In my view, the remedies I did award amply compensated the Union and the employees for the Employer's actions.

Second, I did not find the Employer's actions to be so egregious as to justify an award of legal costs. In fact, in my original decision I noted that the Union had acted aggressively and with some degree of provocation toward the Employer both before and after certification and particularly at the second and third collective bargaining sessions.

Third, there is no evidence before me that an award of legal costs and related expenses would be equitable in the particular circumstances of this case. If such an order does not address an inequity and set it right, then such an order would, in my view, be punitive.

Fourth, except for the successful Section 7 complainant, policy considerations generally urge the Council away from rather than toward, granting legal costs to successful applicants. At least one reason for this is the difficulty of awarding legal costs to a successful defendant. One consequence of the requirement that a remedy can only follow a breach of the Act is that an employer or a union that successfully defends against what turns out to be an unsubstantiated or unwarranted complaint, cannot be awarded its legal costs. This lack of balance in the legislation suggests that it is only in exceptional circumstances that legal costs should be awarded.

The Union's request for an order against the Employer for legal costs and related expenses is dismissed.

Subsequently the Industrial Labour Relations Council of British Columbia held that it had the jurisdiction to award costs under provisions in the then British Columbia *Industrial Relations Act* (now the *Labour Relations Code*) analogous to subsection 91(4) in the Ontario Act. In dismissing a request for reconsideration of this decision, reported at (1993) 16 CLRBR (2d) 65, the Industrial Relations Council stated that:

Two general principles govern all remedies awarded in the labour relations context, including make-whole orders. First, the purpose of the Council's remedial authority is to place the aggrieved party, so far as possible, in the position it would have been, had the breach of the Act not occurred: *Clarke Reefer Lines Ltd.*, B.C. I.R.C. (No. C223/88); *White Spot Ltd.*, *supra*. Second, remedies must be compensatory in nature and not punitive. *Century Plaza Hotel Ltd. and H.R.E.U.*, *Local 40*, [1979] 3 Can LRBR 49 (BCLRB No. 32/79); *Ron Hatfield and Wayne R. Lipskie*, B.C. I.R.C. (No. C63/90), reconsideration of IRC No. C105/87.

It is beyond dispute that, in appropriate circumstances, the Council may award legal costs as an element of a remedial order: *C.P.U. Local 115 v. McNamara*, B.C.S.C. (Vancouver Registry A891161), December 18, 1989, upholding *Tony McNamara and Pierre Comeau*, B.C.I.R.C. (No. C302/88) and B.C. I.R.C. (No. C25/90) [reported 6 CLRBR (2d) 290]. The Council and the predecessor Labour Relations Board have, however, been very reluctant to exercise the authority to award legal costs. This reluctance arises from an imbalance in the availability of the remedy to the labour relations community. Under the Act, a statutory violation must be found before a remedy can be awarded: *The Delta Optimist and Vancouver-New Westminster Newspaper Guild, Local 115*, [1980] 2 Can LRBR 227 (BCLRB No. 26/80); *Harry Metz*, B.C. I.R.C. (No. C77/89). As a result, successful defendants are unable to secure legal costs. The one-sided nature of this potential remedy leads to a perception of unfairness, and militates against its general acceptance as a matter of policy. Also, a policy of awarding legal costs cannot be consistently applied because there is no authority to award such compensation under Part 5 of the Act. In response to these factors, the Council has denied requests for legal costs unless exceptional and compelling circumstances exist: *Imperial Parking Ltd.*, B.C. I.R.C. (No. C220/89).

Where the Council and the Board have made an award of legal costs, it has generally been in the context of a make-whole order. The development of the make-whole order, including an

order than an employer pay the union's legal costs, began in 1975 when the Board's remedial authority under s.28 was expanded. The relevant principles underlying make-whole orders were summarized in *Kidd Brothers Produce Ltd. and Miscellaneous Workers etc. Union, Local 351*, [1976] 2 Can LRBR 304 (BCLRB No. 53/76) [quoted in *Century Plaza Hotel Ltd.*, *supra*, at pp. 70-71]:

First, these orders are of a remedial rather than a penal nature. Second, they are employed in situations where the use of a more traditional remedy, i.e., a cease and desist order, would be inadequate. In these instances, the Employer has often "...already harvested the 'fruits of its violations'". Third, these orders are often issued in cases where the Board has withheld a draconian form of relief. Fourth, these orders arise under the Code, from the expansion of the Board's remedial authority. The purpose of the expansion was to remove the "...artificial restrictions on the type of remedy which may be ordered..." in the new situation created by the Code where the Board finds itself "...the chief agency for giving effect to the law..."

In the non-s. 7 context, make-whole orders involving legal costs have traditionally been granted in circumstances where an employer's conduct deliberately frustrated remedies obtained by the union in earlier proceedings: *Kidd Brothers Produce Ltd.*, *supra*; *Robinson Little Co.*, B.C.L.R.B. letter decision dated March 15, 1986, referred to in *Century Plaza Hotel Ltd.*, *supra*; and *Century Plaza Hotel Ltd.*, *supra*.

46. The B.C. Board has recently confirmed this approach to costs for all cases, including fair representation proceedings, in *Allan Kelland* and *David Dorris*, a decision dealing with requests for reconsideration in two unrelated duty of fair representation proceedings (BCLRB No. B419/93, December 14, 1993).

47. The British Columbia Supreme Court has confirmed this jurisdiction to award costs on a make-whole basis in *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 170 v. IRC, Steisslinger et. al.*, March 9, 1993, Vancouver Registry A922146, unreported (an application for judicial review of the Industrial Relations Council of British Columbia's decision in a duty of fair representation case: IRC No. C68/91; reconsideration denied, IRC No. C231/91). Previously, in *McNamara v. Canadian Paperworkers Union, Local 1115*, (1989) B.C.J. No. 2447, Vancouver Registry No. A891161 (an application for judicial review of an I.R.C. decision in that case at [1989] 20 CLLC ¶16,014), the British Columbia Supreme Court held that:

8. In my opinion, the provision to "rectify a contravention of the Act" in s. 8(4)(b) and 28(1)(b) coupled with an express provision in s. 28(1)(d) to "make an order determining and fixing the monetary value of an injury or loss suffered by a person as a result of a contravention of the Act" clearly indicates the legislative intent to include within Council's broad remedial jurisdiction a mandate to order costs in appropriate circumstances. The next question I must then consider is whether Council's decision to order that the Union reimburse McNamara and Comeau's reasonable legal and other expenses, including costs was patently unreasonable? I think not.

9. I am of the view that Council's order in this case was consistent with its past practice and with the spirit and intent of section 27 of the Act. It is the established policy of Council that where other effective remedies exist a make whole remedy will not be ordered. In the case at bar, Council ordered costs because of the dilatory conduct of the Union to restore the membership rights of McNamara and Comeau frustrating the effect of the Original Panel's order. From the outset, Council repeatedly expressed its position that its order be implemented in a timely manner so as to provide an effective remedy to McNamara and Comeau. In Council's opinion there was no other practical way to remedy the wrong and the special expertise of Council put it in the best position to determine the appropriate remedy. It is the very circumstances found in this case that renders an order for costs reasonably within the scope of Council's remedial jurisdiction.

(Subsequently, the Industrial Relations Council dealt with the costs issues in that case subject to taxation at (1990) 6 CLRBR (2d) 290.)

48. The Canada Labour Relations Board has also held that it has the power to award costs against a respondent under its rectification power, and against an unsuccessful complainant under its power to make orders incidental to the objects of the *Canada Labour Code* (*National Bank of Canada*, 84 CLLC ¶16,038; *British Columbia Telephone Co.*, (1986) 65 CLRBR di 93; and see *Udvarkely*, [1979] 2 Can LRBR 569 and *Lalancette* (1990) 14 CLRBR (2d) 80). However, the Canada Board has displayed the same disinclination to award costs as the British Columbia labour relations tribunal of the day and the Ontario Labour Relations Board.

49. With respect, we find ourselves unable to follow a make-whole approach to costs.

50. First, the make-whole theory is inconsistent with the theory and purpose of legal costs as such (see paragraph 38, above).

51. Second, as the jurisprudence of this Board and in British Columbia suggests, only a successful applicant is entitled the costs on such a theory. Consequently, make-whole costs are neither reciprocal, nor fault-based in any traditional sense.

52. Third, a make-whole theory suggests that costs flow from a breach of the *Labour Relations Act* (or other legislation under which the Board has jurisdiction). Costs do not form part of any common-law theory of damages. Costs have not been considered to be a form of damages. Costs are not remedial in the sense that an award of costs as such cannot properly be dependent upon a breach of a statute.

53. Fourth, the number and kind of cases in which make-whole costs have been awarded suggests defects in the make-whole theory of costs. Why isn't every successful applicant entitled to be made whole? Why do costs depend on the nature or degree of a breach of the *Labour Relations Act*? If costs are awarded only to successful applicants in *some* cases in which a responding party's conduct has been found to be particularly egregious, are costs not being used in a punitive way; that is, in order to penalize a particularly "bad" responding party, rather than as compensation for damages incurred as a result of a breach of the legislation?

54. Fifth, how does the Board deal with the situation of an unrepresented successful applicant in any case, but particularly in an egregious case, since it appears that in most Canadian jurisdictions, including Ontario and British Columbia, a litigant not represented by counsel cannot, on any traditional theory of legal costs, recover costs other than disbursements? Does this mean that only successful applicants represented by counsel are entitled to be made-whole? (See, *Re Tate and Deerhurst Investments Inc. Ltd.*, [1987] 44 D.L.R. (4th) 573 (Ontario Divisional Court); *O'Connell v. Custom Kitchen & Vanity*, (1986) 56 O.R. (2d) 58 (Ontario Divisional Court); *Kowarsky v. Quebec (Procureur General)*, (1988) 21 Q.A.C. 196 (Court of Appeal); *Kendell v. Hunt*, *supra*; *UFFA Management Ltd. v. Accurate Bailiff Collection Agency Ltd.* [1990] 19 ACWS (3d) 1381 (B. C. Court of Appeal); *Skidmore v. Blackmore*, [1990] 5 WWR 634 (B. C. County Court); *Law Society of P.E.I. v. Johnston* (1988) 54 D.L.R. (4th) 18 (P.E.I. Court of Appeal); but see also, *McBeth v. Governors of Dalhousie College & University*, (1985) 68 NSR (2d) 265 (Nova Scotia Supreme Court); (1986) 26 D.L.R. (4th) 321 (Nova Scotia Supreme Court, Appellate Division), in which costs were awarded to a successful unrepresented non-lawyer party on the basis of the Canadian Charter of Rights and Freedoms, a basis specifically rejected in *Law Society of P.E.I. v. Johnston*, *supra*, and *Skidmore v. Blackmore*, *supra*; and see also *Davidson v. Canada*, (1989) 36 Admin L.R. 251 where the Federal Court of Appeal relied on section 15 of the Charter and held that a lawyer representing himself is entitled to costs only to the same extent as any other self-rep-

resented litigant and not to costs relating to his own services as a solicitor; and see also *Jaffe v. Dearing*, (1992) 32 ACWS (3d) 1276 (Ontario Court General Division) where costs were awarded to a Florida lawyer who successfully acted for himself in the claim for fees and where the court noted that the former rule had been abolished in England by legislation (*The Litigants in Person (Costs and Expenses) Act, 1975*) - something which we would have thought suggests that an unrepresented litigant is not entitled to costs unless legislation provides otherwise.)

55. A number of reasons have been advanced as justification for the apparent discrepancy between a true make-whole approach to costs and the actual practice of awarding costs in so few cases that the cases in which costs have been awarded can safely be regarded to be anomalies: (a) costs will discourage parties from pursuing meritorious claims; (b) it is in the public interest that labour relations disputes be settled and costs will interfere with the settlement process; (c) awarding costs will have a negative impact on labour relations by identifying a winner and a loser, particularly where there is a continuing relationship between the parties; (d) costs would require the Board to engage in a time consuming process which would distract the Board from its primary task under the *Labour Relations Act*; (e) the difficulties involved if success is divided between the parties; (f) the Board is ill-equipped to assess and award costs. Whatever the merits of these policy laden arguments, they beg the jurisdictional question. The question is not whether the Board should be able to award costs generally or in a specific case, but whether it has the jurisdiction to do so at all.

56. Accordingly, we return to the first question, which is not addressed by any of the policy laden reasons for not awarding costs; that is, does the Board have the jurisdiction to award costs? As a creature of statute, an administrative tribunal like this Board has only the powers conferred upon it by legislation. The Board has no inherent jurisdiction to award costs. Further, in the context of the recent comprehensive review of the *Labour Relations Act* and the express granting to other tribunals of an authority to award costs, in addition to the remedial jurisdiction and the power to control their own practice and procedures which, as does this Board, these tribunals enjoy, there is no legislation which expressly gives the Board an authority to award costs. Finally, no costs jurisdiction can be implied, either from the provisions of any legislation, or from any apparent need for the Board to be able to award costs.

57. Nor is the situation any different when the Board acts as an arbitrator under section 126 of the *Labour Relations Act*, where the Board has all the powers of the Board and of a board of arbitration (*Re International Association of Heat & Frost Insulators & Asbestos Workers, Local 95 and Master Insulators Association of Ontario et al.*, (1979) 25 O.R. (2d) 8 (Ontario Divisional Court)). In the absence of a specific provision in the collective agreement under which the grievance is brought, there is nothing which gives the Board an express or implied jurisdiction to award costs notwithstanding any suggestion to the contrary in cases like *Joe Arban Contractor Ltd.*, *supra*, (see, *Parlay Construction Ltd.*, [1984] OLRB Rep. Aug. 1120; *Standard Insulation Ltd.*, [1984] OLRB Rep. Nov. 1622; *Re Pictou District School Board and CUPE, Local 867*, (1987) 34 LAC (3d) 307; *City of Dawson Creek*, (1987) 28 LAC (3d) 372).

58. In the result, we find ourselves constrained to conclude that in the absence of a specific provision in a collective agreement in a section 126 proceeding the Board has no jurisdiction to award legal costs as such. This is not to be taken to be a suggestion that the Board does not have the jurisdiction to fashion remedies appropriate to the cases which come before it. The Board has the power and may find it appropriate to award damages which include things which look like but are not "legal costs" properly so called, or which are "legal costs" but are also damages arising out of a breach of the *Labour Relations Act* which are deserving of compensation.

59. In this case the Labourers' Provincial Agreement does not contain a provision which gives the Board the authority to award costs. In the result Bellai's request for costs must be dismissed.

60. However, the Board does find it appropriate to direct Local 247 to reimburse Bellai for its share of the subsection 126(4) expenses incurred with respect to the July 29, 1993 hearing (see *Ontario Construction Limited*, [1993] OLRB Rep. July 630).

3061-93-R; 3111-93-R International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Applicant v. **Cineplex Odeon Corporation**, Responding Party; International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Applicant v. Cineplex Odeon Corporation c.o.b. Scarborough Town Centre Cinemas, Responding Party

Bargaining Unit - Certification - Board considering two certification applications filed by IATSE - In first application, union seeking to represent "front-of-house" staff in municipal unit - In second application, union proposing site-specific unit - Employer proposing single bargaining unit made up of employees in Greater Toronto Area or, alternatively, two municipal units - Board applying *Famous Players* case and finding union's proposed bargaining units appropriate - Certificates issuing

BEFORE: *Pamela Chapman*, Vice-Chair, and Board Members *R. M. Sloan* and *C. McDonald*.

APPEARANCES: *B. Fishbein*, *R. Davis* and *Pat Travers* for the applicant; *David Corbett* for the responding party.

DECISION OF THE BOARD; January 17, 1994

1. These are two applications for certification. The only issue in dispute between the parties in each of the applications is the description of the bargaining unit. In the first application, the applicant seeks to represent employees in the following bargaining unit:

all employees of Cineplex Odeon Corporation in the City of Brampton, save and except assistant managers and persons above the rank of assistant manager, and those persons for whom a trade union held bargaining rights on December 1, 1993.

In the second application, the following bargaining unit is sought by the applicant:

all employees of Cineplex Odeon Corporation at the Scarborough Town Centre Cinemas in the Municipality of Metropolitan Toronto, save and except assistant managers and persons above the rank of assistant manager, and those persons for whom a trade union held bargaining rights on December 6, 1993.

2. The responding party proposes the following bargaining unit description, which would cover both applications:

all employees of the responding party in the Greater Toronto area and for greater particularity

those theaters listed below, save and except assistant manager and persons above the rank of assistant manager, office, clerical and sales staff and those covered by a subsisting collective agreement between IATSE Local 173 and the responding party:

Canada Square	Oakville Mew
Carlton	Promenade
Centennial, Brampton	Scarborough Town Centre
Champlain Centre	Sherway
Eaton's Centre	Cataraqui, Kingston
Erin Mill's Town Centre	South Common Mall
Fairview	Varsity
Finch	Warden Woods
Hillcrest	Woodbine
Humber	Woodside Square
Hyland, Toronto	York
Market Square	401 & 7 Centre
Madison Centre	

In the alternative, the responding party accepts the bargaining unit requested by the applicant in the first application but seeks a bargaining unit in the second application which includes all the theatres operated by Cineplex Odeon Corporation in the Regional Municipality of Metropolitan Toronto.

3. It is undisputed that the bargaining unit description proposed by the applicant in the first application ("the Brampton application") would include all of the employees below the rank of assistant manager at two theatres operated by the responding party in the city of Brampton, except for the projectionist(s) at each theatre who are represented by an affiliate of the applicant, IATSE Local 173 ("Local 173"). These employees work, for the most part, as ushers, cashiers and concession attendants, and are described by both parties as the "front-of-house" staff, which we are told is a term derived from live theatre settings. There are 23 employees in the applicant's proposed unit.

4. Similarly, the unit proposed by the applicant in the second application ("the Scarborough Town Centre application") is a front-of-house unit excluding the projectionist(s), who are also represented by Local 173, but at a single theatre operated by the responding party at the Scarborough Town Centre. There are 27 employees in this proposed unit.

5. The parties agree that the bargaining unit description proposed by the responding party essentially mirrors, in a geographical sense, the scope clause in the collective agreement between Local 173 and the responding party which covers the terms and conditions of employment of projectionists employed at the theatres listed, including the theatres in Brampton and at the Scarborough Town Centre. There are 550 employees in the unit proposed by the responding party.

6. The parties also stipulated to certain additional facts relating to Local 173 and to the pattern of union representation in theatres operated by the responding party and in the industry generally. They agree that:

- (a) Local 173 is an affiliate local of the applicant;
- (b) other affiliates of the applicant have collective agreements with the responding party which cover only projectionists and not front-of-house staff. The scope clauses of these agreements cover all of the theatres operated by the responding party within the geographical jurisdiction of that affiliate;

- (c) no affiliate of the applicant or the applicant itself has a collective agreement anywhere in Canada covering front-of-house personnel in a movie theatre;
- (d) Local B173 is the front-of-house local chartered by the applicant in Ontario. It presently has collective agreements covering employees at several live theatres;
- (e) the applicant has commenced an organizing drive for front-of-house personnel in movie theatres in all of Ontario of which these are the first applications;
- (f) the applicant is an international trade union representing employees in the entertainment industry which organizes itself on quasi-craft lines; and,
- (g) the responding party is a movie chain which operates across North America with its head office located at Toronto.

7. The other facts relating to these applications are also undisputed. The work performed by the front-of-house staff at each of the theatres in the respondent's proposed unit is virtually identical, as are the general terms and conditions of employment. Each of the theatres has a manager, and in most cases an assistant manager, on site; they are responsible for hiring, firing, discipline and other personnel matters at each theatre. Ultimate control, however, rests in the hands of a district manager, and the same district manager directs all of the theatres in the respondent's proposed unit except for the Kingston location. There is some interchange of employees between theatres, particularly in the Toronto region, in the sense that employees at one location may be offered, and may accept on a strictly voluntary basis, additional shifts at another busier location.

8. Both parties made reference to an earlier decision of the Board dealing with the certification of front-of-house staff in a movie theatre, which dealt specifically with the question of whether a single theatre in a theatre chain is an appropriate bargaining unit. In *Famous Players Inc.*, [1990] OLRB Rep. May 509, the Board reviewed recent jurisprudence concerning single branch bargaining units, and then reached the following conclusions:

• • •

8. Returning to the facts, the Place de Ville theatre is run essentially as an independent branch. The Manager makes all decisions with respect to hiring, firing, and scheduling of employees. Although employees from Place de Ville do work at other theatres, and employees throughout the 8 theatres do work shifts at different theatres, the "transfers" or additional simultaneous shifts are agreed to by employees and are usually shifts in addition to their regular shifts at their base theatres. Although fragmentation and a potential multiplicity of bargaining units could result if a single theatre is found to be appropriate, as the jurisprudence recited indicates, those legitimate and significant concerns must be weighed against the obstacles to organizing that would be created by finding a multi-branch bargaining unit to be the only appropriate bargaining unit.

9. It may well be that the employer's prediction will prove to be accurate and the bargaining unit sought by the applicant will not provide it with sufficient bargaining strength to secure any significant gains for the employees. But this potential bargaining strength problem does not warrant the conclusion that bargaining would not be viable in what is otherwise an appropriate unit, a unit where employees share a sufficiently coherent community of interest.

10. In the result, we are satisfied that the bargaining unit sought by the applicant is an appropri-

ate bargaining unit, and having regard to the agreement of the parties, the Board finds that all employees of the respondent regularly employed for not more than twenty-four (24) hours per week at the Place de Ville cinemas, 300 Spark Street, Ottawa, save and except supervisors, persons above the rank of supervisor, office and clerical staff and projectionist constitute a unit of employees of the respondent appropriate for collective bargaining.

9. Noting that the facts in this case are virtually identical to those canvassed in the *Famous Players Inc.*, *supra*, case, the applicant asks that we reach the same conclusion here with respect to the Scarborough Town Centre application, and that with respect to the Brampton application we find a traditional municipality unit to be appropriate. In addition to *Famous Players Inc.* counsel for the applicant relies upon *Carecor Security Service Inc.*, [1991] OLRB Rep. Aug. 962, and *Toyota Canada Inc.*, [1991] OLRB Rep. July 922.

10. The responding party, on the other hand, seeks to distinguish this case from *Famous Players Inc.*, and also argues that the jurisprudence relied upon by the Board in that case has been altered significantly by the subsequent release of *MDS Health Group Limited*, [1993] OLRB Rep. September 849. Counsel acknowledges that the facts set out in *Famous Players Inc.* do not differ substantially from the facts in the present application, but relies on two differences he claims are significant: the fact that the applicant is a union with experience organizing employees in this industry, unlike (we are asked to presume) the applicant in *Famous Players Inc.*; and the history of bargaining on a broader geographical basis, as detailed above, by affiliates of the applicant who represent other theatre employees, and in particular Local 173. These distinctions, he submits, demonstrate that there are no significant obstacles to organizing front-of-house employees of the responding party on a broader geographical basis, and also establish that the unit proposed by the responding party is presumptively appropriate.

11. Furthermore, counsel for the responding party asks us to interpret the *MDS Health Group Limited*, *supra*, case as requiring an applicant who seeks a single location unit despite the existence of other locations within the same municipality to call evidence to establish the existence of significant impediments to organizing on a broader basis. As no such evidence was called by the applicant in the present case, he submits that we must find the larger unit to be appropriate in order to prevent fragmentation. He also relies upon *Mobil Chemical Canada, Ltd.*, [1987] OLRB Rep. Apr. 559, *Kidd Creek Mines*, [1986] OLRB Rep. June 736, and *Hornco Plastics Inc.*, [1993] OLRB Rep. May 411.

12. There are important distinctions between the facts in the present case and those reviewed in the *MDS Health Group Limited* decision, in addition to the most obvious one that a different industry is involved. The employer's operations in that case were much more integrated than those of the responding party here in terms of reporting relationships, interchange and inter-relationship of employees and of work, and even the physical locations of the various sites. While the number of employees at the specific location sought to be certified in that application was comparable to the sizes of the units proposed here, many of the other locations operated by MDS were much smaller, including nine single-person locations. And perhaps most importantly, the circumstances in the *MDS Health Group Limited* application were virtually identical to those reviewed in an earlier decision of the Board, *Cybermedix Limited* [1979] OLRB Rep. Aug. 743, where a municipal-wide bargaining unit was **proposed by the applicant** but challenged by the employer. Given these circumstances, and the absence of anything in the particular facts or evidence to establish any unusual obstacles to organizing on a broader basis, the Board in *MDS Health Group Limited* declined to depart from the finding in *Cybermedix Limited* that a municipal-wide unit was appropriate.

13. In the present case, having carefully reviewed the submissions of the parties and the

jurisprudence of the Board they rely upon, we are not convinced that the distinctions highlighted by the responding party between these applications and the one in *Famous Players Inc.* warrant a departure from the conclusion reached in that case that a single-theatre unit is viable and thus appropriate for collective bargaining. Neither the applicant's experience representing other employees in this industry, nor the scope clause negotiated by Local 173 are determinative of the question of whether or not the unit proposed by the responding party would create obstacles to organizing. While affiliates of the applicant have been able to organize projectionists into a quasi-craft unit encompassing theatres in a fairly broad geographical region, front-of-house staff have not been successfully organized in the past, and never by this applicant. The unit proposed by the responding party covers a large distance and a large number of employees working at quite autonomous locations. In this situation, the obstacles to organizing are self-evident.

14. At the same time, the responding party has not identified any serious labour relations problems which would result from finding the units sought by the applicant to be appropriate for collective bargaining. As this Board has said in numerous cases since *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, the central question in determining whether or not the bargaining unit sought by an applicant is appropriate is whether or not it encompasses a grouping of employees viable for the purposes of collective bargaining without causing serious labour relations problems for the employer; if it is, it will generally be granted regardless of whether or not it is the **most** appropriate, or the **most** comprehensive. Indeed, this is stated clearly in the *MDS Health Group Limited* case relied upon by the responding party, at paragraph 41. For the same reasons set out in the *Famous Players Inc.* case, we are satisfied that the single theatre unit proposed by the applicant in the Scarborough Town Centre application is viable and thus appropriate for collective bargaining. There were no serious objections by the responding party to the municipal unit sought by the applicant in the Brampton application, and we similarly find this unit to be appropriate.

15. With respect to the application for certification in Board file 3061-93-R, the Board finds that all employees of Cineplex Odeon Corporation in the City of Brampton, save and except assistant managers and persons above the rank of assistant manager, and those persons for whom a trade union held bargaining rights on December 1, 1993 constitute a unit of employees of the responding party appropriate for collective bargaining.

16. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit described in paragraph 15, on December 1, 1993, the certification application date, had applied to become members of the applicant on or before that date.

17. With respect to the application for certification in Board file 3111-93-R, the Board finds that all employees of Cineplex Odeon Corporation at the Scarborough Town Centre Cinemas in the Municipality of Metropolitan Toronto, save and except assistant managers and persons above the rank of assistant manager, and those persons for whom a trade union held bargaining rights on December 6, 1993 constitute a unit of employees of the responding party appropriate for collective bargaining.

18. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit described in paragraph 17, on December 6, 1993, the certification application date, had applied to become members of the applicant on or before that date.

19. Certificates will issue to the applicant with respect to both bargaining units.

3235-93-R International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Applicant v. Cineplex Odeon Corporation, Responding Party

Bargaining Unit - Certification - Board not persuaded that union's "motivation" for organizing employees relevant to issue of bargaining unit description - Board applying *Famous Players* case and finding union's proposed site-specific bargaining unit appropriate - Certificate issuing

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *J. A. Ronson* and *P. V. Grasso*.

APPEARANCES: *Bernard Fishbein*, *Pat Travers* and *Al Cowley* for the applicant; *D. N. Corbett* and *I. Cohen* for the responding party.

DECISION OF THE BOARD; January 18, 1994

1. This is an application for certification.
2. There is no dispute that the applicant is a trade union within the meaning of the *Labour Relations Act*.
3. The parties do not agree on the description of the unit of employees appropriate for collective bargaining. The union seeks what might be described as a "site specific" bargaining unit - that is, a unit confined to a single theatre complex. The employer asserts that the bargaining unit should encompass a number of theatres in the Metropolitan Toronto area.
4. This matter came on for hearing before the Board on January 18, 1994. After hearing the parties' representations, the Board made the following oral ruling:

We can appreciate the employer's concerns about "fragmentation" and the viability of the union's proposed bargaining unit (although long-term viability should also be a concern for the trade union). Those are legitimate concerns from both the employer's perspective, and from a public policy point of view. However, having considered the parties' representations, we are not persuaded that this application is meaningfully distinguishable from the *Famous Players* case ([1990] OLRB Rep. May 509), or from the Board's most recent decision on this issue between these parties released yesterday (Board Files 3061-93-R and 3111-93-R released January 17, 1994). Nor are we persuaded that the union's "motivation" for organizing the employees affects either our conclusion as to the appropriateness of the bargaining unit, or the overall disposition of the case. It is difficult to see how the union's reason for organizing is relevant to the bargaining unit configuration, but in any event, it does not alter our conclusion that the unit the union has applied for is "appropriate". Even assuming, without finding, the employer's facts to be true, we are satisfied that what we have described as a "site specific" bargaining unit is appropriate for collective bargaining, and [having regard to the union's documentary evidence of support] that a certificate should therefore issue in respect of the unit that the union has applied for.

5. The Board found and hereby confirms that the unit of employees appropriate for collective bargaining should be framed as follows:

all employees of Cineplex Odeon Corporation at the Cineplex Odeon Varsity Cinemas in the City of Toronto, save and except assistant manager and persons above the rank of assistant manager, and persons for whom any trade union held bargaining rights as of December 13, 1993.

6. The Board found and hereby confirms that more than fifty-five per cent of the employees of the responding party in the bargaining unit on December 13, 1993, the certification application date, had applied to become members of the applicant on or before that date.

7. A certificate will issue to the applicant.

3098-93-G International Union of Operating Engineers, Local 793, Applicant v. John Maggio Excavating Ltd., Responding Party

Construction Industry - Construction Industry Grievance - Practice and Procedure - Reconsideration - Employer failing to attend Board hearing and seeking to have Board reconsider decision making various orders and declarations - Employer claiming that union official represented that Board hearing scheduled for 2:30 p.m. and not 9:30 a.m. as indicated in Board's Notice of Hearing - Board finding that party who fails to check Notice of Hearing and chooses to rely on recollection or representation of others does so at its own risk - Reconsideration application dismissed

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Kobryn*.

DECISION OF THE BOARD; January 24, 1994

1. This construction industry grievance was heard by this panel of the Board on December 20, 1993. When this application came on for hearing, no one appeared on behalf of the responding party. The Board waited its customary thirty minutes and, having heard nothing from the responding party as to the reasons for its absence, this panel heard the evidence of the applicant and made the declarations and orders contained in our decision dated December 20, 1993.

2. By way of letter dated December 21, 1993, John Maggio, on behalf of the responding party, wrote to the Board. In essence, Mr. Maggio asks that any decision of the Board against the responding party be withheld until he can attend before the Board. In support of this request, Mr. Maggio makes three representations which are summarized below:

- (a) he was not aware that the Board hearing on December 20, 1993, would be held at 9:30 a.m. Mr. Maggio states that "the union" advised him that the hearing was to be held at 2:30 p.m. on December 20, 1993. The letter further indicates that Mr. Maggio did attend at the Board on December 20, 1993, at 2:30 p.m. and spoke to the Labour Relations Officer appointed to this file;
- (b) he was forced by the union to sign a letter prepared on his letterhead to be directed to Sonterlan Construction asking it to direct monies to be paid to various sub-trades to the applicant instead; and
- (c) he had believed that the issues raised in this Board file had been settled in November, and that the responding party had complied with all of the applicant's requests.

3. This panel's decision in this matter was issued on December 20, 1993. As we did not

receive Mr. Maggio's letter until after our earlier decision was issued, it is not possible to withhold any orders or declarations contained in that prior decision.

4. Although the request of Mr. Maggio has not been made on the proper form and does not otherwise comply with the Board's Rules of Procedure, we have determined to treat Mr. Maggio's request as a request for reconsideration. Pursuant to section 108(1) of the *Labour Relations Act*, the Board has the discretion to reconsider any decision it has made. Section 108(1) of the Act states as follows:

108.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

5. The Board's policy regarding reconsideration has been clearly enunciated in its jurisprudence including *John Entwistle Construction Limited* [1979] OLRB Rep. Nov. 1096, and *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185. As a general proposition, the Board will not reconsider a decision unless a party intends to introduce new relevant evidence which could not have been previously obtained by the use of reasonable diligence, and where such evidence, if adduced, would be practically conclusive of the case. Alternatively, the Board may reconsider its previous decision if a party intends to raise objections or make representations which were not already considered by the Board and which the party had no prior opportunity to raise. The rationale for the narrow limits imposed on the exercise of the Board's power to reconsider its earlier decisions is obvious - only if Board decisions are considered to be final can they be relied upon as establishing the rights as between the parties.

6. In this particular case, the second and third grounds set out above as the basis for Mr. Maggio's request are not grounds upon which the Board would reconsider its prior decision. At the hearing of this matter, the union did not rely upon any letter to Sonterlan Construction referred to by Mr. Maggio. With respect to the third ground, the fact that this grievance was received by the Board on December 6, 1993, and forwarded to the responding party three days later, should have been an indication to the responding party that the union was not satisfied with any purported resolution which the responding party had thought had been reached. These two grounds express no intention to introduce new relevant evidence, nor do they raise an argument or objection that the employer could not have raised at the hearing.

7. With respect to the first ground raised by Mr. Maggio, the Board has reviewed the Board file. On December 9, 1993, a Form B-45, "Notice to Responding Party of Referral of Grievance to Arbitration under Section 126 and of Hearing, Construction" was sent to John Maggio Excavating Ltd. with a copy of the union's application. It was forwarded to the same address reflected by Mr. Maggio's letterhead on his correspondence of December 21, 1993. Form B-45 contains, amongst other things, the following information and warnings:

1. The applicant, on *DECEMBER 2, 1993*, referred a grievance to the Ontario Labour Relations Board for a final and binding determination. A copy of the referral is attached.
5. **The hearing of the application will take place** in the "Board Room" 6th Floor, 400 University Avenue, Toronto, Ontario, on *MONDAY, DECEMBER 20, 1993, at 9:30 A.M.*

IMPORTANT NOTE

IF YOU DO NOT FILE YOUR RESPONSE AND OTHER REQUIRED DOCUMENTATION IN THE WAY REQUIRED BY THE RULES, THE BOARD MAY NOT PROCESS YOUR RESPONSE AND DOCUMENTS, AND MAY DECIDE THE APPLICATION WITHOUT FURTHER NOTICE TO YOU. FURTHERMORE, YOU MAY BE DEEMED TO HAVE ACCEPTED ALL OF THE FACTS STATED IN THE APPLICATION.

THE BOARD'S RULES OF PROCEDURE DESCRIBE HOW A RESPONSE MUST BE FILED WITH THE BOARD, WHAT INFORMATION MUST BE PROVIDED AND THE TIME LIMITS THAT APPLY.

PLEASE CONSULT THE BOARD'S RULES OF PROCEDURE BEFORE COMPLETING YOUR RESPONSE. COPIES OF THE BOARD'S RULES MAY BE OBTAINED FROM THE BOARD'S OFFICE LOCATED ON THE 4TH FLOOR AT 400 UNIVERSITY AVENUE, TORONTO, ONTARIO (TEL. (416) 326-7500).

IF YOU DO NOT ATTEND THE LABOUR RELATIONS OFFICER MEETING OR THE HEARING, THE BOARD MAY DECIDE THE APPLICATION WITHOUT FURTHER NOTICE TO YOU AND WITHOUT CONSIDERING ANY DOCUMENT YOU MAY HAVE FILED.

YOU HAVE THE RIGHT TO COMMUNICATE WITH, AND RECEIVE AVAILABLE SERVICES FROM, THE BOARD IN EITHER ENGLISH OR FRENCH.

PLEASE INDICATE WHETHER YOU WILL REQUIRE ANY SPECIFIC SERVICES, INCLUDING TRANSLATION SERVICES FOR WITNESSES, OR SERVICES FOR PERSONS WHO ARE HEARING OR VISION IMPAIRED OR OTHER SERVICES. THE BOARD WILL ATTEMPT TO ACCOMMODATE YOU, BUT MAY NOT BE ABLE TO MEET YOUR SPECIFIC REQUEST(S).

(emphasis in original)

8. It is clear from Board Form B-45 that the hearing of this matter was scheduled for hearing on December 20, 1993, and that by notice dated December 9, 1993, the responding party was advised of the date, place and time of the hearing. Assuming for the sake of argument that a representative of the trade union did advise Mr. Maggio that the hearing was scheduled for 2:30 p.m. on December 20, 1993, we would not, on that basis alone, reconsider our decision of December 20, 1993. The Form B-45 sent to the responding party is the formal notice of hearing from the Board. It cannot be superseded or otherwise amended or altered by the parties. A party who fails to check the Board's Notice of Hearing and chooses to rely upon the recollection or representation of others does so at its own risk. The risk of so doing is that which occurred in this case - attending at the Board after the completion of the case and the issuance of the decision.

9. As adequate grounds for reconsideration have not been disclosed, the request by the responding party for reconsideration is denied. The decision of the Board dated December 20, 1993, is affirmed.

3767-92-U Service Employees International Union, Local 204 and Local 532, Applicants v. **The Canadian Red Cross Society Ontario Division**, Victorian Order of Nurses Brant-Haldimand-Norfolk, Comcare (Canada) Limited, Med Care Partnership, The Visiting Homemakers Association of Hamilton-Wentworth, Hamilton-Wentworth Home Care Program - Victorian Order of Nurses and Victorian Order of Nurses Respite Program, The Regional Municipality of Hamilton-Wentworth, Olsten Health Care Services, Medical Personnel Pool (Hamilton) Ltd., Mohawk Medical Services, Para-Med Health Services and Brant County Home Care Program, Veterans Affairs Canada, Responding Parties

Employer - Interference in Trade Unions - Intimidation and Coercion - Strike - Strike Replacement Workers - Unfair Labour Practice - “Home Cares” contracting with various “service provider” agencies, including Red Cross, to provide various therapeutic and support services to clients in their homes - Red Cross employees commencing legal strike - Home Cares arranging for other service providers to attend to clients - Union alleging breach of statutory ban on use by employer of strike replacement workers - Board not accepting union’s argument that Home Cares actually true “employer” in this case or that Home Cares and service providers “acting on behalf” of Red Cross - Applications under sections 73.1 and 73.2 dismissed - Board finding that letter sent to Red Cross employees suggesting that employees might lose their jobs if they commenced or stayed on strike violating the Act

BEFORE: *Judith McCormack*, Chair, and Board Members *D. A. MacDonald* and *B. L. Armstrong*.

APPEARANCES: *Mary Cornish, Sean Fitzpatrick, Cindy Wilkey, Boris Ulehla, Doug Anderson, Richard Zawislak, Debbie Murray and Linda Micks* for the applicants; *Tim Liznick, Janice Baker, Robert Little, Barbara Trahan, Geoff Graham, Barb Heatherington and Helen Fleischman* for The Canadian Red Cross Society Ontario Division; *Gordon Weir* for Victorian Order of Nurses Brant-Haldimand-Norfolk Branch; *Robert Calder, Lisa Hamilton and Lewis Nickerson* for Comcare (Canada) Limited; *Maryann Crnekovic and Charles Humphrey* for Med Care Partnership; *Barbara Carson* for The Visiting Homemakers Association of Hamilton-Wentworth; *Brian Lawson* for Hamilton-Wentworth Home Care Program - Victorian Order of Nurses and Victorian Order of Nurses Respite Program; *David Beck* for The Regional Municipality of Hamilton-Wentworth; *Jane Richardson, Michelle Gage and Anne Hardy* for Olsten Health Care Services; *Larry G. Culver, Larry Kielbowich and Tom Dixon* for Medical Personnel Pool (Hamilton) Ltd.; *Gordon Weir* for Victorian Order of Nurses Brant-Haldimand-Norfolk Branch; no one appearing for the Veterans Affairs Canada; *John D. Lewis, Donald B. Jarvis and Sue McGregor* for Mohawk Medical Services; *Jennifer Barnes and Mel Rhineland* for Para-Med Health Services; *Margaret Scott and Paul Stillman* for Brant County Home Care Program.

DECISION OF THE BOARD; January 10, 1994

I. FACTS

1. This is an application under section 91 of the *Labour Relations Act* alleging that the responding parties have violated sections 5, 73.1, 73.2, 65, 67 and 71 in circumstances which are said to involve the use of replacement workers. The responding parties take the position that they have not violated any of these provisions. The applicants have requested various forms of relief including among other things a declaration, a cease-and-desist order, damages, and a posting. In

light of the reverse onus in section 73.1(9), The Canadian Red Cross Society ("Red Cross") and eleven other responding parties who appeared at the hearing proceeded first. The other responding party did not appear.

2. Although the Board heard extensive evidence in this matter, ultimately it became apparent that there was not much dispute about most of the salient facts. The case before us relates to a branch of the health care sector which provides a variety of therapeutic and support services to clients in their homes. The impetus behind the development of these services is the belief that this method of service delivery is both more beneficial to the clients and less expensive than many alternatives. Some of these clients have recently been discharged from hospitals and need various kinds of rehabilitative or palliative care. For others, the care helps to delay their entry into an institution such as a nursing home. The services provided include nursing, occupational and physiotherapy, and homemaking. The latter involves services such as personal care, laundry, cooking meals, shopping and banking. This case involves a strike by employees of Red Cross who provide home-making services.

3. Financing for this program is granted by both the Ministry of Health and the Ministry of Community and Social Services. Funds are given to certain types of agencies which the parties referred to as "Home Cares". In this case, the relevant Home Cares are Brant County Home Care Program ("Brant Home Care") Hamilton-Wentworth Home Care Program-Victorian Order of Nurses ("HW Home Care") and the Regional Municipality of Hamilton-Wentworth Support Services ("The Region"). These agencies accept clients who require home care services, and then contract out to another set of agencies whose employees actually provide that care. The latter agencies are called "service providers" by the parties, and include two branches of the Red Cross which employ the homemakers in question. Service providers bill the Home Cares on a regular basis and the fees paid as a result are regulated by the Ministry of Health.

4. Both Brant Home Care and HW Home Care operate in a similar manner, while the Region has a slightly different system. Brant Home Care and HW Home Care accept clients from a number of sources who require a variety of therapeutic and support services. These include clients characterized as acute or chronic, and those who are physically disabled or the frail elderly. They are then assessed by case managers employed by the Home Cares, who arrange for the appropriate services to be provided by one of the service providers with whom they contract. The Home Cares' case managers continue to be involved with the clients to some extent, reassessing them on a regular basis.

5. In the case of Brant Home Care, homemaking services were contracted out to the Brantford branch of Red Cross, and two other service providers prior to the strike. However, Red Cross received 98% of the client referrals as a result of a Ministry of Health policy which gives priority to not-for-profit service providers, and a preference by the Board of Health which administers Brant Home Care to use local agencies. The other two service providers prior to the strike were for-profit companies which were used only if a client was already using a particular agency by virtue of his or her insurance, or if Red Cross did not have a homemaker available to handle the referral. As of January 1st, 1993, the Brantford branch of Red Cross was providing services to approximately 1200 clients referred by Brant Home Care.

6. The contract between Brant Home Care and Red Cross contains the following provisions:

1.2 Home Care reserves the right to designate the individuals to receive services. The Society shall have the discretion to refuse to render services to a particular individual in the event that the Society is unable to obtain the services of a homemaker for that particular person. In the

event that the Society is unable to render services requested or cannot commence such services on the day or days requested then this fact shall be communicated forthwith to Home Care by the Society.

1.3 In the event that the Society is unable or unwilling to provide homemaker services to a person or persons then Home Care reserves the right to service such individuals by alternate means.

4. NON-EXCLUSIVITY

The Society acknowledges that Home Care has entered into agreements similar to the within Agreement with other providers of Homemaker Services and that Home Care is under no obligation whatsoever to provide to the Society any minimum or guaranteed amount of Homemaker services during the term of this Agreement. The Society agrees, however, that to the extent any Homemaker Services are provided in accordance with the provisions of Section 2.1 hereof, that such Homemaker Services shall be provided in accordance with the provisions of this Agreement.

7. In the Hamilton-Wentworth area, HW Home Care contracted with the Dundas branch of the Red Cross and six other service providers prior to the strike. Roughly 5 to 6% of its approximately 5,000 clients were referred to Red Cross. This lower proportion results in part from the fact that the Dundas branch of Red Cross only provides services to a part of the geographic area covered by HW Home Care. However, within the northwest area serviced by the Dundas Red Cross, the majority of referrals by HW Home Care went to Red Cross, again because of a preference for not-for-profit agencies. Referrals were always made to Red Cross first in the northwest area, and only if Red Cross did not have a homemaker available were they directed to the other for-profit service providers. There were approximately 139 clients who were receiving services from Dundas Red Cross homemakers when the strike began. The HW Home Care contract with Red Cross includes articles similar to those in the Brant Home Care contract.

8. The Region contracts with a total of nine service providers, including the Dundas branch of Red Cross. As a matter of policy, it divides its referrals evenly between for-profit and not-for-profit service providers. Prospective clients are given a needs test by the Region's staff and then provided with a list of agencies from which to choose. In practice, a number may already have an agency providing service because they are sent by HW Home Care when the latter's funding criteria no longer covers them. Unlike the two other Home Cares, the Region does not provide any assessment or monitoring of the client's situation, which is handled by the initial referral source. In effect, the Region essentially acts as a kind of broker for services, putting clients in touch with agencies and providing payment to those agencies on the basis of billing. In February of 1993, there were 14 clients being serviced by the Dundas branch of Red Cross out of a total of 580 Region clients. Again, the Region enters into written contracts with service providers like Red Cross. While it does not have explicit non-exclusivity clauses in those contracts, service providers are advised that the Region contracts with a number of agencies at the time the contracts are entered into.

9. To summarize at this point then, there are three Home Cares involved in this case which refer clients to either the Brantford or Dundas branches of Red Cross in addition to other service providers. Red Cross also accepts clients from other sources, including private clients, and those referred by organizations such as the Cancer Society. The number of these clients is very small, and the vast majority of clients serviced by Red Cross are referred by the Home Care programs. There are 5500 homemakers across Ontario employed by Red Cross. Local 204 of the Service Employees International Union ("SEIU") represents 237 of those homemakers at the Brantford branch, and Local 532 represents 48 homemakers at the Dundas office. The other

homemakers are unorganized. There is no question that Red Cross hires, fires, trains and supervises the homemakers in this case.

10. With this background in mind, we turn to the events which prompted the application. The most recent collective agreements between Red Cross and the two SEIU bargaining units expired in December, 1992, and the parties commenced their third round of negotiations in September of 1992. A conciliation officer was appointed on October 23, 1992 and on January 14th, 1993, the homemakers voted to strike.

11. Both in this round and the previous round of negotiations, Red Cross raised the issue of the Home Cares taking back the clients if there was a strike. At a negotiating session on January 20th, the evidence indicates that Red Cross suggested there might be layoffs as a result of a drop in referrals relating to the possibility of a strike. Red Cross also sent letters to homemakers in the Brantford branch on January 28th, 1993, setting out its negotiating position and containing the following passages:

The Society also receives a higher rate for its Toronto Homemaking locations. However, instead of using that higher rate to pay its Toronto Homemakers higher wages, the Society uses that money to fund wages in locations where the government's funding rate is low; for example, the Brantford and Dundas Homemaker locations. In fact, the Society has provided the same wage grid and benefit package to all of its 5,500 Homemakers across Ontario. It is obvious that the Society cannot justify treating Brantford and Dundas better than the 5,500 Homemakers across the province. That would not be fair, nor affordable.

* * *

Remember, that we are not the only Homemaking agencies in Brantford/Dundas. Other agencies are available and willing to take and keep our clients. In fact, we are already losing clients.

12. The next day, Helen Fleischman, the Manager of homemakers in the Dundas branch sent a letter to employees in Dundas which was very similar. However, that letter contained the following passages:

Homecare may now stop referring new clients to the Branch in order to minimize the potential impact on clients in the event of a strike. We estimate that we will be losing 2,500 hours in Brantford and 560 hours in Dundas each month.

* * *

Remember, that we are not the only Homemaking agency in Dundas. Other agencies are available and willing to take and keep our clients. In fact, we may already be losing clients.

Both letters close by telling employees that it is now illegal for them to serve their clients during the strike, and urging them to attend a union meeting whenever it is called so that they can present their opinions.

13. It is clear from the evidence of Brant and HW Home Cares that any decline in referrals in January had nothing to do with the possibility of a strike, as they did not in fact stop making referrals until the last week of February. In fact, their evidence indicates that at that point they had not advised Red Cross that they would stop referring clients if there was a strike and that neither Home Care advised Red Cross prior to the strike that they would not be referring the clients back to Red Cross after the strike. In the end, no homemakers were in fact laid off prior to the strike.

14. As a strike deadline loomed, Red Cross asked the applicants at a negotiating meeting on February 11th if they would consent to the use of some bargaining unit members during the

strike for “critical” clients. No details were provided other than a figure for the number of homemakers required. Barbara Trahan, Director of Home Support Services for Red Cross, indicated that its negotiating team had not discussed who those clients were before the request was made to the unions. Neither did they discuss having management perform the work. The applicants initially refused to consent to the use of bargaining unit employees, and then requested more information. After that conversation and over the lunch hour that day, Red Cross drafted a letter asking the unions to consent to the use of employees for “high risk” clients. It contained the following passages:

The Home Care programs of Hamilton-Wentworth and Brant County have identified a certain number of high risk clients, i.e. clients whose lives, health or safety would be endangered by a withdrawal of service. Approximately 40 Brantford and 10 Dundas homemakers would be required to service these clients.

* * *

We would emphasize that it is not the Society that determines which clients are in the high risk category -- that determination is made by the Home Care programs.

* * *

Servicing this relatively small number of clients will surely not have any negative impact on the Union’s position during the strike.

* * *

We anticipate that we will be able to update the number of homemakers required on Friday, as well as, identify the appropriate homemakers who are currently servicing these clients.

You have indicated today that you will not consent to the use of bargaining unit employees. We would hope that you will reconsider this position. If you do reconsider, please advise us immediately.

15. Both Betty Muggah and Pat Davies, the Directors of HW Home Care and Brant Home Care respectively, testified that neither Home Care had at this point either identified clients in this regard or provided figures to Red Cross. The evidence of Ms. Trahan was that the figures on the number of critical clients from which Red Cross estimated the number of homemakers required on February 11th were from a phone call between Barbara Heatherington, the Manager of the Red Cross Brantford homemakers, and Ms. Davies at lunch time that day and from Ms. Fleischman. Ms. Heatherington told the Board that she did call Brant Homecare but spoke to another member of management, and obtained an estimate of how many clients were receiving essential services. She also spoke to the supervisors at Red Cross. The figure of forty homemakers which she came up with as a result was also an estimate, as she did not know how many homemaking hours were required. Her evidence was that Ms. Fleischman was unable to contact anyone at HW Home Care that day.

16. Red Cross declined to provide much of the information requested by the applicants on the grounds of confidentiality. In particular, Ms. Trahan testified that Red Cross would never have divulged which clients had been identified as high risk. She agreed that it would be difficult for the unions to assess whether these clients fell into one of the exemptions in the Act without their names.

17. Red Cross did not provide the update information referred to in the letter of February 11th, and the applicants did nothing more at that point. Richard Zawislak, a business agent for SEIU, told the Board that the applicants thought the ball was in Red Cross’s court. The position of

Red Cross was that it was waiting to hear from SEIU. On March 17th, lawyers for SEIU wrote to Red Cross asking for detailed information with respect to the latter's request. The response to this by Red Cross was to the effect that other agencies had been able to accommodate all the vulnerable clients. Ms. Heatherington testified that if the unions had consented, Red Cross would have taken care of the clients involved. However, she told the Board that she probably told Ms. Davies on February 12th that Red Cross could not look after these clients, even though the issue was still under discussion.

18. On February 12th, Red Cross sent homemakers a letter attaching the full text of its last offer, and informing them that this proposal would be implemented as soon as the unions were in a strike position. In addition the letter stated that the collective agreement would not apply after that date, and that Red Cross would cease the deduction of union dues. Then on February 24th, the unions officially notified Red Cross that homemakers would be on strike as of March 1st.

19. When Ms. Davies became aware of the possibility of a strike, she decided to develop a contingency plan. The gist of this plan was that if a strike occurred, the Brant Home Care case managers would assess the clients being serviced by Red Cross and identify those requiring homemaking on an urgent or critical basis. These clients would then be referred to other service providers. In cross-examination, Ms. Davies referred to these clients as "high risk", and said that these were clients who could not live at home without services, including palliative care. (Homemakers are not permitted to provide medical care, give medication, deal with medical devices such as colostomy bags, or take temperatures or blood pressure.) Brant Home Care's contingency plan also provided that new referrals would continue to be made to Red Cross if homemaking was not essential; where it was essential, referrals which would have gone to the Red Cross went to the other service providers.

20. Towards the end of January, Ms. Davies contacted seven service providers, including five which had not been used by Brant Home Care previously. She advised them that there was the possibility of a strike at Red Cross, that she needed other agencies to help service clients, and asked them if they had homemakers available. It appears that she also contacted the Waterloo and Woodstock branches of Red Cross in this regard. Several of those contacted raised questions about whether servicing clients formerly serviced by Red Cross would contravene the replacement worker provisions. As a result, Ms. Davies decided to obtain a legal opinion via a consultant at the Ministry of Health. This opinion, which was qualified in significant respects, indicated that sections 73.1 and 73.2 did not apply. She told the Board that her view was that if Red Cross was unable to fulfill its contract, she could contract with other agencies, and in fact, she was obligated to ensure that services were provided as a result of the *Health Insurance Act*. Ms. Trahan told the Board that Red Cross never advised Brant Home Care that the former could continue to provide services to critical clients during a strike if certain conditions under the Act were met, and Ms. Davies testified that she was not aware this was an option. Later she said that she became aware of it around February 23rd. Ms. Heatherington, on the other hand, told the Board that Brant Home Care was advised prior to the strike that Red Cross was seeking the unions' consent to use bargaining unit employees to look after clients. She testified that she was not aware that Red Cross could have applied to the Board for directions with respect to specified replacement workers.

21. During the last week of February, 1993, Brant Home Care supervisors instructed case managers to call clients, advise them that Red Cross was going on strike, and talk to them about arranging for homemaking with another service provider. All 1200 clients were called. On March 1st, the Red Cross homemakers went on strike. Ms. Davies then implemented her contingency plan and case managers started referring clients to some of the service providers previously contacted by Ms. Davies. These did not include the two other branches of Red Cross, as the latter had

decided not to substitute homemakers from other locations for striking homemakers in light of the replacement worker provisions of the Act. Initially, only eighteen clients were identified as critical. Ultimately, 300-400 clients were reassigned. Criteria in this regard were left up to case managers. While the service providers would not necessarily know whether any particular client had been formerly serviced by Red Cross, they were aware that the use of their services, or the increase in volume of referrals in the case of those used by Brant Home Care prior to the strike, was as a result of the Red Cross strike.

22. Ms. Davies kept in touch with Red Cross, and sent them lists of the clients who had been discharged from Red Cross and referred to other agencies. Between 700-800 clients previously referred to Red Cross were not referred elsewhere, and as a result did not receive any home-making services at all. Some of these clients said that they could manage by themselves, some had assistance from their families, and some said they would prefer to wait until their Red Cross homemaker was back. In some cases, the Red Cross homemakers had serviced the clients for several years, and a bond had been formed. Ms. Davies told the Board that initially she expected that if the strike had been short, the clients previously serviced by Red Cross and referred to the other agencies would be returned to Brant Home Care at the end of the strike for reassignment to Red Cross, as long as the client agreed. The only exception would have been for one of the for-profit service providers with whom she had discussed the possibility of giving them a "market share" and to whom she felt some obligation, despite the preference for not-for-profit agencies. If the strike went on for longer, Ms. Davies was less clear about what would happen. Ms. Heatherington told the Board that she never suggested to Ms. Davies that the clients should be referred back when the strike was over.

23. HW Home Care's response to the strike was similar to that of Brant Home Care. On February 23rd, Ms. Muggah authorized a memo instructing case managers not to make any new homemaking referrals to Red Cross and to commence reassigning critical clients to other agencies. The remainder of the clients Red Cross had been servicing were to be reassigned based on their ability to sustain a gap in service. Again, assessments were made by HW Home Care case managers and no criteria were given to them in this regard. All the service providers to whom former Red Cross clients were referred had been used by HW Home Care prior to the strike. They were advised that they were being asked to take on these clients as a result of the strike. One service provider did not want to take the clients unless the referrals were "business as usual" in the sense that they were new referrals, rather than former Red Cross clients. This was because that agency had a positive relationship with SEIU in its nursing home division, and it did not want to jeopardize that relationship. Ms. Muggah also agreed that Red Cross had provided exemplary service for many years.

24. On the second day of the strike, Ms. Muggah in conjunction with other members of her staff decided to make the reassignments permanent. In other words, Red Cross would not get the clients back after the strike. Ms. Muggah testified that this was based on the possible disruption to clients if they were subsequently reassigned back to Red Cross after the strike and the resulting break in the continuity of care. At that point, however, some of the reassigned clients had not yet received visits from their new homemakers, and some were very attached to their Red Cross homemakers.

25. Similarly, the week before the strike, the Region's subsidy staff began contacting their fourteen Red Cross Clients, and made arrangements for them to be serviced by other service providers. As at the time of the initial referral, clients were given a choice of agencies.

26. The effect of these arrangements by the Home Cares was that homemakers employed

by other service providers were now doing the work which Red Cross homemakers had been doing previously. In addition, the work was being done at the same location, that is, the clients' homes. Private clients of Red Cross were also referred to other service providers.

27. On March 5th, Red Cross wrote to Local 204 through its solicitors, advising in essence that it was likely the Dundas service would close as a result of the strike and the subsequent transfer of clients, indicating that it had said this in bargaining and suggesting that the longer the strike went on, the longer it would take to recall the Brantford homemakers in relation to client build-up.

28. Three days later, Red Cross wrote to the homemakers in letters which included the following passages:

The Homemakers in both branches are in difficult positions and I am sure they feel badly about their clients. Some Homemakers are concerned about availability of work after a strike and left last week and obtained employment with other Homemaking Agencies. Their take-home pay will be considerably less than they enjoyed with the Society: no extended health benefits, \$0.77 less per hour in wages, and no mileage reimbursement (as Homemakers services a wide "rural" area they were paid an average of \$1.19 for every hour they worked). This direct loss (wages + mileage) of at least \$1.96 per hour will be a tremendous hardship to them.

* * *

As you are aware it is the nature of the service industry that, if we do not have clients to serve, we do not have jobs for Homemakers. During a strike our client base is lost to other providers and, in the view of Home Care, would be too disruptive for these clients to be returned to Red Cross once they have been assigned elsewhere. From the start, we have made it clear to the Union representatives, every year, that, if there was to be a strike, Homemakers would likely lose their jobs. Unfortunately during negotiations, the Union representatives did not appear to have taken this possibility of permanent loss of clients into account while planning their actions.

* * *

In Dundas, during the last working day before the strike, the Hamilton-Wentworth Home Care Program reassigned the 170 clients, which had been served by Dundas Homemakers to other providers. On March 4, 1993 we have confirmation from the Home Care Program that we will only have 2 (two) of those clients reinstated when the strike is resolved. Given the fact that the Dundas Branch only receives, on average, 1 (one) referral per day, we foresee recalling only 1 (one) Homemaker per week. With client discharges taken into account, at this rate it would take until April 1994 before all 45 Dundas Homemakers could be recalled.

With the disruption of our Dundas and Brantford programmes we will temporarily reallocate the management and administrative staff to other Branches, while we examine the options available and immediately, the viability of the the Dundas Homemaker Services operation. The other Branch programmes will continue to operate out of both Branch offices, as per usual.

(emphasis added)

29. On March 10th, a lawyer for Red Cross wrote to Local 204 advising that Red Cross had decided to close the Dundas service, that all employees would be terminated, and that therefore there was no point in continuing negotiations for the Dundas local. Other Red Cross programs would continue to operate out of the Dundas branch. The Red Cross then closed down its Dundas homemaking services permanently, and 45 of the striking homemakers lost their jobs. Some of them obtained new positions with the service providers who were servicing former Red Cross clients. In some cases, the service providers attempted to ensure that these homemakers were not assigned to former Red Cross clients; in others, no attempt was made to either prevent this or provide that it happened. Several of the service providers required the homemakers to resign from Red Cross before employing them, but for others, no inquiry was made in this regard.

30. The evidence of Ms. Trahan indicates that the decision to end the Dundas branch's homemaking service was made, at least in part, as a result of the HW Home Care's decision on March 4th that it would not be returning clients to Red Cross after the strike. However, it also appears that Red Cross did not confirm the permanence of the referrals until after its Executive Committee had passed a motion to close the Dundas homemaking service. Ms. Trahan testified that several days into the strike, she was told by Ms. Fleischman that HW Homecare had said Red Cross would not be getting the clients back. She told the Board that she had sent a letter to HW Home Care confirming this, although Ms. Muggah testified that HW Homecare did not receive this letter. Ms. Muggah confirmed, however, that she did tell Ms. Trahan that the clients were not returning. This was before they had consulted clients in this regard, even though she testified that the client's preferences would have been determinative. Ms. Muggah did not tell Ms. Trahan why the clients would not be returned, and Ms. Trahan did not ask. Red Cross has been providing service in the area for 46 years.

31. There was another conversation between Ms. Trahan and Ms. Muggah that day about whether the referral pattern would be different after the strike, particularly in light of the introduction of an expanded homemaker program which would likely create more referrals. Ms. Muggah advised that the new program would probably not start until the fall and agreed that the maximum increase would be 30%, mostly in the Hamilton area. However, Ms. Muggah also told the Board that Red Cross had an increasing caseload in that area as a result of the growth in the caseload of HW Homecare, and that Red Cross could have had all the referrals it could handle. If Red Cross had homemakers available, it would have received all the referrals in the relevant geographic area. She testified that if Red Cross came to HW Home Care and said that it needed a core of clients to continue, the Home Care would try to cooperate. Agencies have told the Home Care before that they needed a critical mass to survive and, Ms. Muggah testified, HW Home Care has tried to be sensitive to this. She also said that the Home Care would be very pleased to continue to refer new clients to the Dundas branch of the Red Cross, and that their policy would be to make as many referrals as Red Cross could have taken.

32. Shortly after the closure of the Dundas service, Red Cross applied for a final offer vote of homemakers under section 40 of the Act. Red Cross then sent the homemakers another letter which included the following passages:

As you know, we have been forced to close the Dundas Homemaker Services due to the permanent loss of its client base.

Approximately 200 of Brantford's clients have been reassigned to other agencies. The other 3 agencies in Brantford are actively hiring so as to be able to take referrals from Home Care.

33. The relationship between the Home Cares, Red Cross and the other service providers is structurally an arm's length one in the sense that there was no evidence of overlapping directors, and so forth. In addition, it is clear that the other service providers are actually competitors of Red Cross for referrals from the Home Cares. Red Cross does have a fairly close working relationship with the Home Cares because their staff communicate about the needs of the clients, but this appears to be the extent of it. There is no evidence that Red Cross requested the Home Cares to take the clients back or refer them elsewhere during the strike, although it is clear that it assumed that this would happen. In other words, Red Cross never thought that it would be stuck with clients for whom it could not provide service. Prior to the strike, Red Cross kept the Home Cares updated on the state of negotiations and the possibility of a strike. It also advised the Home Cares that it could not service clients during the strike. The Home Cares developed their contingency plans without Red Cross's involvement, although in one conversation, a Red Cross official suggested the names of several not-for-profit service providers in this regard. There was no communi-

cation at all between Red Cross and the other service providers. When the Home Cares referred the clients elsewhere, Red Cross discharged them from its program.

II. ARGUMENT

34. In essence, the unions' position is that the Home Cares and/or the service providers were acting on behalf of the Red Cross in accepting the Red Cross clients, and thus fell within the definition of "employer" under section 73.1. As a result, the employees of the service providers were prohibited replacement workers. In the alternative, counsel argues that the Home Cares alone were employers of the homemakers, and that they contracted out to the service providers for replacement workers contrary to section 73.1(6)5. The unions acknowledge that there were no formal arrangements between Red Cross and the others, but point out that the actions of the Home Cares and the service providers relieved the Red Cross of the dilemma it would have been in as a result of the strike. This dilemma was one the legislation intended it to be in, and for which there was a comprehensive code with respect to the use of specified replacement workers. In the alternative, the unions say that we should define employer broadly, that we are enjoined to interpret it in keeping with its spirit and intent by the *Interpretation Act*, and that the intention is clearly to prevent replacement workers from doing struck work at the strike location (the "place of operations" in respect of which a strike or lockout is taking place). In interpreting "employer" in sections 73.1 and 73.2, we should look not only to the purpose of the provisions, but also by analogy, to sections 1(4), 64.1, and the allied doctrine for picketing, which are also relevant to the question of whether the responding parties were acting on behalf of Red Cross. The unions argue that unless we find that what happened here violated the Act, it will be impossible for homemakers to organize since they will not be able to strike in any meaningful sense as the work will be immediately removed. In the unions' view, Red Cross has circumvented the scheme of replacement worker provisions, when it could easily have taken care of the critical clients and met its labour relations obligations by functioning within that scheme. In the alternative, the unions argue that the responding parties violated sections 65, 67, and 71 by choosing a course of action that destroyed the bargaining rights of homemakers when other courses of actions were available, and by intimidating and coercing homemakers through the sequence of events set out above. In this connection, the unions also assert that Red Cross was prepared to give up the clients because it wanted to set an example for its unorganized homemakers of the disastrous consequences of organizing.

35. Red Cross and the other responding parties argue, among other things, that sections 73.1 and 73.2 are not struck work provisions, in the sense that the Legislature did not prohibit everyone from doing the work. Rather, the legislation prohibits the employer from using a wide variety of people to do the work. Here, the Home Cares and the service providers were acting in their own interests, either fulfilling their statutory mandates to provide care (the Home Cares) or increasing their market share and obtaining more work (the service providers). Since there was no benefit to Red Cross, and indeed considerable harm to Red Cross in the case of the Dundas operation, it could not be said that the Home Cares and the service providers were acting on behalf of Red Cross, and thus, they were not employers. Moreover, they cannot be considered employers in the absence of acting on behalf of Red Cross, according to counsel, because they function completely independently and at arm's length. To find that competitors, for example, were acting on behalf of Red Cross tortures the plain meaning of the replacement worker provisions according to the responding parties. Even if the allied doctrine provided an analogy in interpreting "employer" in sections 73.1 and 73.2, this situation would not be caught by that doctrine, as enunciated in *Consolidated Bathurst Packaging Limited*, [1982] OLRB Rep. Sept. 1274. If Red Cross did not intend to use specified replacement workers under section 73.2, it had no obligation to work through the consent provisions of that section with the unions, and there is no requirement that an employer must use bargaining unit employees or specified replacement worker provisions, as long

as it is not employing other replacement workers. In any event, Red Cross asked the unions to consent to the use of bargaining unit employees, and the unions refused. Red Cross analogizes the situation to one where General Motors has two suppliers, Stelco and Dofasco. If Stelco employees strike, in counsel's view section 73.1 was not intended to prevent General Motors from getting more of its supplies from Dofasco. If it did so, Dofasco employees could not be considered replacement workers for Stelco.

III. DECISION

36. Sections 73.1 and 73.2 provide as follows:

73.1- (1) In this section,

“employer” means the employer whose employees are locked out or are on strike and includes an employers’ organization or person acting on behalf of either of them; (“employeur”)

“person” includes,

- (a) a person who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations, and
- (b) an independent contractor; (“personne”)

“place of operations in respect of which the strike or lock-out is taking place” includes any place where employees in the bargaining unit who are on strike or who are locked-out would ordinarily perform their work. (“lieu d’exploitation à l’égard duquel la grève ou le lock-out a lieu”)

(2) This section applies during any lock-out of employees by an employer or during a lawful strike that is authorized in the following way:

- 1. A strike vote was taken after the notice of desire to bargain was given or bargaining had begun, whichever occurred first.
- 2. The strike vote was conducted in accordance with subsections 74(4) to (6).
- 3. At least 60 percent of those voting authorized the strike.

(3) For the purposes of this section and section 73.2, a bargaining unit is considered to be,

- (a) locked out if any employees in the bargaining unit are locked out; and
- (b) on strike if any employees in the bargaining unit are on strike and the union has given the employer notice in writing that the bargaining unit is on strike.

(4) The employer shall not use the services of an employee in the bargaining unit that is on strike or is locked out.

(5) The employer shall not use a person described in paragraph 1 at any place of operations operated by the employer to perform the work described in paragraph 2 or 3:

- 1. A person, whether the person is paid or not, who is hired or engaged by the employer after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
- 2. The work of an employee in the bargaining unit that is on strike or is locked out.

3. The work ordinarily done by a person who is performing the work of an employee described in paragraph 2.

(6) The employer shall not use any of the following persons to perform the work described in paragraph 2 or 3 of subsection (5) at a place of operations in respect of which the strike or lock-out is taking place:

1. An employee or other person, whether paid or not, who ordinarily works at another of the employer's places of operations, other than a person who exercises managerial functions.
2. A person who exercises managerial functions, whether paid or not, who ordinarily works at a place of operations other than a place of operations in respect of which the strike or lock-out is taking place.
3. An employee or other person, whether paid or not, who is transferred to a place of operations in respect of which the strike or lock-out is taking place, if he or she was transferred after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
4. A person, whether paid or not, other than an employee of the employer or a person described in subsection 1 (3).
5. A person, whether paid or not, who is employed, engaged or supplied to the employer by another person or employer.

(7) The employer shall not require an employee who works at a place of operations in respect of which the strike or lock-out is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the agreement of the employee.

(8) No employer shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten to dismiss a person or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of the person's refusal to perform any or all the work of an employee in the bargaining unit that is on strike or is locked out.

(9) On an application or a complaint relating to this section, the burden of proof that an employer did not act contrary to this section lies upon the employer.

73.2-(1) In this section, "specified replacement worker" means a person who is described in subsection 73.1 (5) or (6) as one who must not be used to perform the work described in paragraphs 2 and 3 of sub-section 73.1(5).

(2) Despite section 73.1, specified replacement workers may be used in the circumstances described in this section to perform the work of employees in the bargaining unit that is on strike or is locked out but only to the extent necessary to enable the employer to provide the following services:

1. Secure custody, open custody or the temporary detention of persons under a law of Canada or of the Province of Ontario or under a court order or warrant.

2. Residential care for persons with behavioural or emotional problems or with a physical, mental or developmental handicap.
3. Residential care for children who are in need of protection as described in subsection 37(2) of the *Child and Family Services Act*.
4. Services provided to persons described in paragraph 2 or 3 to assist them to live outside a residential care facility.
5. Emergency shelter or crisis intervention services to persons described in paragraph 2 or 3.
6. Emergency shelter or crisis intervention services to victims of violence.
7. Emergency services relating to the investigation of allegations that a child may be in need of protection as described in subsection 37(2) of the *Child and Family Services Act*.
8. Emergency dispatch communication services, ambulance services or a first aid clinic or station.

(3) Despite section 73.1, specified replacement workers may also be used in the circumstances described in this section to perform the work of employees in the bargaining unit that is on strike or is locked out but only to the extent necessary to enable the employer to prevent,

- (a) danger to life, health or safety;
- (b) the destruction or serious deterioration of machinery, equipment or premises; or
- (c) serious environmental damage.

(4) An employer shall notify the trade union if the employer wishes to use the services of specified replacement workers to perform the work described in subsection (2) or (3) and shall give particulars of the type of work, level of service and number of specified replacement workers the employer wishes to use.

(5) The employer may notify the trade union at any time during bargaining but, in any event, shall do so promptly after a conciliation officer is appointed.

(6) In an emergency or in circumstances which could not reasonably have been foreseen, the employer shall notify the trade union as soon as possible after determining that he, she or it wishes to use the services of specified replacement workers.

(7) After receiving the employer's notice, the trade union may consent to the use of bargaining unit employees instead of specified replacement workers to perform some or all of the proposed work and shall promptly notify the employer as to whether it gives its consent.

(8) The employer shall use bargaining unit employees to perform the proposed work to the extent that the trade union has given its consent and if the employees are willing and able to do so.

(9) Unless the parties agree otherwise, the terms and conditions of employment and any rights, privileges or duties of the employer, the trade union or the employees in effect before it became lawful for the trade union to strike or the employer to lock out continue to apply with respect to bargaining unit employees who perform work under subsection (8) while they perform the work.

(10) No employer, employers' organization or person acting on behalf of either shall use a specified replacement worker to perform the work described in subsection (2) or (3) unless,

- (a) the employer has notified the trade union that he, she or it wishes to do so;
- (b) the employer has given the trade union reasonable opportunity to consent to the use of bargaining unit employees instead of the specified replacement worker to perform the proposed work; and
- (c) the trade union has not given its consent to the use of bargaining unit employees.

(11) In an emergency, the employer may use a specified replacement worker to perform the work described in subsection (2) or (3) for the period of time required to give notice to the trade union and determine whether the trade union gives its consent to the use of bargaining unit employees.

(12) On application by the employer or trade union, the Board may,

- (a) determine, during a strike or a lock-out, whether the circumstances described in subsection (2) or (3) exist and determine the manner and extent to which the employer may use specified replacement workers to perform the work described in those subsections;
- (b) determine whether the circumstances described in subsection (2) or (3) would exist if a strike or lock-out were to occur and determine the manner and extent to which the employer may use specified replacement workers to perform the work described in those subsections;
- (c) give such other directions as the Board considers appropriate.

(13) On a further application by either party, the Board may modify any determination or direction in view of a change in circumstances.

(14) The Board may defer considering an application under subsection (12) or (12) until such time as it considers appropriate.

(15) In an application or a complaint relating to this section, the burden of proof that the circumstances described in subsection (2) or (3) exist lies upon the party alleging that they do.

(16) The employer and the trade union may enter into an agreement governing the use, in the event of a strike or lock-out, of striking or locked-out employees and of specified replacement workers to perform the work described in subsection (2) or (3).

(17) An agreement under subsection (16) must be in writing and must be signed by the parties or their representatives.

(18) An agreement under subsection (16) may provide that any of subsections (4) to (10) do not apply.

(19) An agreement under subsection (16) expires not later than the earlier of,

- (a) the end of the first strike described in subsection 73.1 (2) or lock-out that ends after the parties have entered into the agreement; or
- (b) the day on which the parties next make or renew a collective agreement.

(20) The parties shall not, as a condition of ending a strike or lock-out, enter into an agreement governing the use of specified replacement workers or of bargaining unit employees in any future strike or lock-out. Any such agreement is void.

(21) On application by the employer or trade union, the Board may enforce an agreement under subsection (16) and may amend it and make such other orders as it considers appropriate in the circumstances.

(22) A party to a decision of the Board made under this section may file it, excluding the reasons, in the prescribed form in the Ontario Court (General Division) and it shall be entered in the same way as an order of that court and is enforceable as such.

37. There was a considerable degree of consensus between the parties with respect to the overall legislative intent of these sections. It is apparent that they are not “motive” provisions in the sense that anti-union animus or some specific kind of intent is required. Like section 81 which provides for a statutory freeze, an anti-union intent may be relevant, but not necessary. In contrast, for example, section 72(2) defines a “professional strike-breaker” as someone whose primary object is to interfere with, obstruct, prevent, restrain or disrupt the exercise of rights in connection with a strike or lockout, and provides that “strike-related misconduct” has a similar motive-oriented meaning.

38. We adopt the submissions of several of the responding parties to the effect that the purpose of these amendments is to preserve the integrity and effectiveness of the strike as an economic weapon and to provide countervailing economic power to employees. In addition, both the unions and several of the responding parties referred us to material related to the legislative process which indicated that in a more general sense, the Legislature intended these provisions to reduce industrial conflict, facilitate the entry of women, part-time and other marginalized employment groups into collective bargaining, and encourage compromise.

39. The unions also pointed out that we were bound to interpret these sections in a manner consistent with the *Interpretation Act* which provides as follows:

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

Indeed, we accept that this is true with respect to the provisions of the various statutes that the Board administers. In addition, counsel for both the unions and a number of the responding parties referred us to various parts of section 2.1, which sets out the purposes of the Act.

40. There is no doubt that all of this provides the interpretative context in which we must apply sections 73.1 and 73.2. On the other hand, as eloquent as the unions’ arguments were with respect to the purpose of the amendments, legislative intent does not in itself provide freestanding rights, nor does it substitute for specific and substantive provisions. Legislative purpose only becomes meaningful as one part of the exercise of understanding and administering some concrete provision. As a result, we turn to the amendments themselves.

41. Section 73.1 sets out various kinds of prohibitions with respect to the performance of work during a strike. Those prohibitions relate to the type of person or employee involved, the nature of the work, the location of the work, reprisals, and certain conditions and definitions. Section 73.2 then provides exceptions to those prohibitions, various procedures and rights with respect to the performance of work in those exceptional conditions, a mechanism for agreement and provisions for directions and enforcement.

42. It is clear that these sections do not purport to ban the performance of the work of striking employees absolutely. For example, in addition to the named exceptions set out in section 73.2, the structure of section 73.1 permits the use of certain types of persons either explicitly or by omission. At the same time, however, it is also apparent that the prohibitions are very comprehensive in scope, particularly in the case of work performed at the strike location. The differences between

the restrictions under section 73.1(5) at any place of operations operated by the employer, and what is prohibited at the strike location by section 73.1(6) make it necessary for us to first determine whether the work in this case is being performed “at a place of operations in respect of which the strike or lock-out is taking place”.

43. Section 73.1(1) provides the following definition for this phrase:

“place of operations in respect of which the strike or lock-out is taking place” includes any place where employees in the bargaining unit who are on strike or who are locked out would ordinarily perform their work.

44. A reading of sections 73.1(5) and (6) together indicates that the Legislature intended that there be a more comprehensive ban on the performance of work at the strike location, presumably in part because that location is considered a more sensitive flashpoint with respect to picket line conflict. In this case, the homemakers ordinarily perform their work at the home of the client, making it a place of operations in respect of which the strike or lock-out is taking place. There was no dispute that the employees of the service providers currently furnishing homemaking services to those clients are also doing so at the home of the client, as the nature of the service itself implies. As a result, this situation falls within the more stringent prohibitions set out in section 73.1(6).

45. Critical to this case however, is the fact that section 73.1(6) prohibits *the employer* from using the persons described to perform the relevant work. In the circumstances before us, the evidence make it clear that Red Cross was not itself using anyone to do the work in question. However, section 73.1(1) provides the following expanded definition of “employer”:

“employer” means the employer whose employees are locked out or are on strike and includes an employers’ organization or person acting on behalf of either of them;

“person” includes,

- (a) a person who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations, and
- (b) an independent contractor;

46. The unions argue that we should give the word “employer” a meaning which would sweep in both the Home Cares and the service providers, based on the concept of the allied doctrine with respect to picketing, an analogy to section 1(4) of the Act with respect to related employers, the kind of reasoning the Board uses in considering who is the real employer in contracting out circumstances such as those reflected in *Kennedy Lodge*, [1984] OLRB Rep. July 931, and the purpose of the provisions in a manner consistent with *Haldimand-Norfolk* (No. 3) (1989). 1 P.E.R. 17. In the alternative, the unions say that the Home Cares and the service providers were acting on behalf of Red Cross, based in part on some of the same analogies.

47. Turning first to the issue of the meaning of the word “employer” simpliciter, we note that the definition of employer in section 73.1(1) is exhaustive, rather than inclusive, unlike the definition of “person”. In light of this, and keeping in mind the specific expansion set out in the provision with respect to persons acting on behalf of the employer, the plain meaning of “employer” alone does not at first glance suggest that it would encompass, for example, arm’s length competitors like the other service providers in this case. We accept the sound proposition in *Haldimand-Norfolk*, *supra*, that we should be giving “employer” a meaning most consistent with the purposes of these provisions. However, it must also bear some relationship to the plain meaning of the word itself, a match that can be made in the circumstances of *Haldimand-Norfolk*, *supra*.

but which is very weak here. Even with respect to the relationship between the Home Cares and Red Cross, it is quite simply stretching things to describe the Home Cares as employers of the Red Cross homemakers on the facts before us. We accept that the fact that Red Cross hires, fires, disciplines, trains, directs, supervises and pays the homemakers is not necessarily determinative; the Board has made it clear in both *Kennedy Lodge, supra*, and *Brantwood Manor Nursing Homes Limited*, [1986] OLRB Rep. Jan. 9 that it is not merely a question of which party performs these functions, but how they do so and to what degree. In this case, however, the facts do not give rise to a finding that the Home Cares have the kind of fundamental control over the homemakers that would establish they were in reality their employer.

48. By saying this, we should not be taken to have commented on whether the various relationships between Red Cross, the Home Cares, and the other service providers amount to the circumstances which would qualify for a declaration under section 1(4) of the *Labour Relations Act*. The applicants, while arguing that we should interpret “employer” in an expansive manner which reflected a labour relations context including the Board’s section 1(4) jurisprudence, stopped short of asking for a section 1(4) declaration. Indeed, in light of the fact that section 1(4) was not pleaded, counsel for the applicants agreed that we should not make findings in this regard, a view that was echoed by some of the responding parties who indicated that other evidence might have been led had an application under section 1(4) been made. The applicants subsequently made such an application, which is currently adjourned *sine die*. As a result, we make no comment on the applicability of section 1(4) to these circumstances, other than to note that we have not explored some of the qualifications and nuances in the evidence before us which might relate to that issue.

49. In these circumstances, we take the unions’ argument by analogy to section 1(4) as little more than a plea for a certain generosity of interpretation, and as providing the context for an expansive view of “employer”. Again, we have no difficulty with this as a general proposition; it does not, however, by itself, lead us to the conclusion that either the Home Cares or the service providers are in fact employers of the Red Cross homemakers.

50. We now turn to the unions’ arguments with respect to whether the Home Cares and service providers fall within the more expanded definition of “employer” by virtue of “acting on behalf” of Red Cross. Both the unions and a number of the responding parties argued at length with respect to the test to be applied in determining whether a party was acting on behalf of another. Among other things, we were referred to *T. Eaton Company Limited*, [1985] OLRB Rep. June 941, which, it was suggested, stood for the proposition that a party was not acting on behalf of another if it had a sustainable business reason of its own.

51. We do not find, however, that *T. Eaton Company, supra*, stands for that proposition. The Board in that case considered the respondents’ sustainable business reasons in two ways: first, in the exercise of ascertaining Cadillac Fairview’s motive for certain conduct, it looked to see whether it had a sustainable business justification; secondly, in the course of developing what was in essence a new form of unfair labour practice, it attempted to balance the respective interests of the parties, including Cadillac Fairview’s justifiable business reason. We agree that it is indeed a useful part of the process of attempting to identify why a responding party is embarking on a particular course of conduct to consider whether they have a business reason. However, this is simply part of the process of examining the facts of a case and drawing reasonable and probable inferences in the particular circumstances. It does not suggest that the existence of such a reason is determinative, but rather that it will be a significant fact among others in coming to relevant conclusions. A party may well be acting on behalf of another and at the same time, have business reasons of its own for a particular course of conduct.

52. Because the issue of whether a person is “acting on behalf” of another is essentially factual, we think it would be a mistake to overanalyze it or set up some more elaborate test, as some of the parties urged. The plain meaning of the phrase suggests that to come within its ambit, at least part of the reasons for a party’s activities must be to provide some benefit to another or at the behest of another. In this connection, we accept that where employers who are normally competitors conduct themselves so as to provide a kind of tacit, mutual aid arrangement during a strike, that may amount to “acting on behalf” of one, whether or not, for example, it would also amount to making them allies for the purposes of picketing. However, those are simply not the facts before us.

53. The other service providers in this case did nothing to assist Red Cross in any way. They were competitors who were only too pleased to obtain either a share of the work, or a larger share of the work at the expense of Red Cross. The only restraint shown in this regard related to the service provider who did not wish to jeopardize its relationship with SEIU. This competitiveness was even manifest in one of the other not-for-profit service providers who was also happy to pick up the clients and indicated that if Red Cross was out of the picture permanently, it wished to submit a proposal for the work. The service providers accepted the work solely to improve their own positions, and with no interest or intent to assist Red Cross in any manner. There was some indication that they were interested in assisting the Home Cares; that, however, was clearly based on the status of the Home Cares as a source of business, and a desire to use this opportunity to obtain more of that business. In any event, that would only be relevant for our purposes if the Home Cares were acting on behalf of Red Cross.

54. Again, we find on the facts before us that this is simply not the case. We accept that it is important to make these assessments in context, and that in the health care sector, relieving a not-for-profit agency of clients it could no longer service might well be a significant benefit, particularly an agency so concerned about its reputation as some of the evidence indicated. We also accept the proposition in *T. Eaton Company Limited, supra*, to the effect that intent may be inferred in those circumstances. Indeed, the fact that the action of the Home Cares extricated Red Cross from precisely the pressure that a strike in the health care sector exerts might well lead us to the conclusion that it was acting on behalf of Red Cross in other circumstances. However, in this case, the evidence made it clear that the Home Cares took the clients back because they felt both legally and morally obliged to provide them with service. In fact the Home Cares, far from wishing to assist the Red Cross, acted with somewhat ruthless disregard for its welfare. The most obvious example of this is the decision of HW Home Care to make the new assignments permanent, a decision it maintained even in the face of information that it would mean the closing of the Dundas service of Red Cross. To some extent it appeared that this decision was made with reference to HW Home Care’s legal position; it was certainly difficult to justify on the basis of continuity of care given the very early point in the strike when it was made. Even discounting for some self-serving aspect, however, it amply demonstrates the relative indifference with which the Home Cares conducted themselves in relation to Red Cross.

55. In other words, the facts of this case do not fit into the language of section 73.1, even on the most generous interpretation. As a result, and in the absence of a finding that the Home Cares, the service providers and Red Cross are related employers under section 1(4), we find that neither the Home Cares or the other service providers were either employers of the homemakers or acting on behalf of Red Cross so as to bring themselves within the expanded definition of employer in section 73.1.

56. The applicants argued that in the alternative, “use” in section 73.1(6) should be interpreted broadly enough so that even if “employer” did not include the Home Cares or the service

providers, we should conclude Red Cross was indirectly using the employees of the service providers so as to bring them within the ambit of the ban. However, the relationship between Red Cross and the homemakers employed by the other service providers was so remote as to defy even the most liberal construction of "use". Among other things we note again that the service providers were arm's length competitors, that they were not acting on behalf of Red Cross and that Red Cross had no control or even influence over either the other service providers or the homemakers employed by them. These are not circumstances which lend themselves to the conclusion that Red Cross was using the other service providers' employees. The effect is that neither they nor Red Cross violated section 73.1, since there is no evidence that Red Cross itself utilized replacement workers.

57. In these circumstances, there is no violation of section 73.2 as well. Counsel for the applicants conceded that for there to be a violation of that section on the facts before us, the ban on replacement workers would have to extend to the Home Cares and the other service providers. She also agreed that Red Cross was not required to use section 73.2 if it was not planning to use any workers during the strike. Since we have found that the ban on replacement workers does not extend to the other responding parties, and since Red Cross did not itself attempt to use replacement workers, whether or not Red Cross conducted itself in accordance with the mechanisms for agreement or resolution with respect to the use of specified replacement workers or bargaining unit employees is not in issue, at least for the purposes of considering a violation of section 73.2.

58. As a result of our findings in this regard, the portion of the application relating to sections 73.1 and 73.2 is dismissed, and it is unnecessary for us to consider some of the other arguments of the responding parties.

59. We cannot leave this subject without noting with some concern the contrast between the intent of these provisions and their application in this context, where structural contracting out has diffused accountability between the Home Cares and the service providers. The effect of this is to empty any real meaning from the right to strike, and hence the bargaining rights. We recognize that in choosing how far these provisions will reach out to cover strangers to the employment relationship, the Legislature has drawn what would normally be reasonable lines. The result, however, in these circumstances is troubling.

60. We now turn to whether on the facts of this case, Red Cross, the Home Cares or the service providers violated section 65, 67 or 71 of the *Labour Relations Act* which provide as follows:

65. No employer or employers' organization and no person acting on behalf of an employer or employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

* * *

67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

* * *

71. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

61. The applicant alleged that Red Cross had violated sections 65, 67 and 71, while the Home Cares and other services providers had contravened sections 65 and 71. Sections 65 refers either to an employer, or a person acting on its behalf. Given our findings above with respect to the Home Cares and the other service providers, they were not in a position to violate this section being neither employers of the homemakers, nor persons acting on behalf of Red Cross. With respect to section 71, which proscribes intimidation and coercion by persons as well, there was no evidence before us which would suggest that either the Home Cares or the other service providers engaged in such conduct. The other service providers were essentially bystanders to this dispute, and the Home Cares, while they might be accused of a rather surprising indifference to the homemakers, did not engage in any activities directed at intimidating or coercing them. To the extent that the applicants' argument in this regard rested on the Home Care's removal and reassignment of the clients, we find it tenuous. There was no evidence that this conduct was intended to intimidate or coerce the homemakers and no evidence from which such intention could be inferred. Rather, the evidence was to the contrary, that is, to the effect that the Home Cares acted solely to assist the clients.

62. The conduct of Red Cross, however, is quite a different matter. The evidence indicates that a central theme of its communications with homemakers and their unions was that the homemakers would lose their jobs if they exercised their right either to strike or to stay on strike. Red Cross stressed this theme on a number of occasions in both negotiations and letters to the homemakers and their unions. Among other things, in January Red Cross suggested to the unions in negotiations that there might be layoffs as a result of a drop in referrals relating to the possibility of a strike. The evidence indicates that the Home Cares had not reduced referrals at the time that this was said, and Ms. Heatherington admitted that any drop in referrals had nothing to do with the possibility of a strike at that point. Red Cross also wrote to the homemakers that month, indicating that the Home Cares would stop referring clients in order to minimize the impact in the event of a strike, and advising they were already losing clients, with obvious implications for job security. Again, the evidence indicates that the Home Cares had not either decided or advised Red Cross that they would do this, and did not stop referring clients until the last week of February.

63. Similarly, in March after the strike began, Red Cross wrote to Local 204 to the effect that it was likely the Dundas service would close as a result of the strike and the subsequent client transfers, and indicating that the longer the strike went on, the longer it would take to recall the Brantford homemakers. Three days later, Red Cross wrote to the homemakers, telling them that it had said from the start that if there was a strike, homemakers would lose their jobs, and implying that the Dundas operation might close. Three days after that, Red Cross announced the closure of

the Dundas service, terminated the employment of the homemakers, and told Local 204 that there was no point in continuing negotiations for them. It then applied for a final offer vote, and wrote the homemakers again, urging them to vote for Red Cross' last offer. These letters also refer to the Dundas closing and imply the possibility of the same fate for Brantford. At this time, Brant Home Care had not decided whether or not the referrals to other agencies would be made permanent.

64. We are not prepared to comment on whether the closing of the Dundas service violated the Act since the portion of the complaint which included that allegation was withdrawn. However, the remainder of the evidence indicates that Red Cross on a number of occasions suggested, implied or outright told the homemakers that they were likely to lose their jobs if they exercised their right to strike or to continue on strike. And assuming without finding that the Dundas closing was properly motivated, it is also clear that Red Cross used it as a threat hanging over the heads of the homemakers both before and after the closure.

65. One of the most fundamental themes that runs through this Board's jurisprudence is that it is difficult to find anything more intimidating or coercive to an employee than the threat of losing their job. (See for example, *Dylex Limited*, [1977] OLRB Rep. June 357; *Viceroy Construction Company Limited*, [1977] OLRB Rep. Sept. 562; *Brinks Canada Limited*, [1982] OLRB Rep. Aug. 1140; *Somerville Belkin Industries Limited*, [1980] OLRB Rep. May 791; *Trulite Industries Limited*, [1983] OLRB Rep. May 821; *Aurora Resthaven Extended Care and Convalescent Centre*, [1986] OLRB Rep. August 1031; and *Thermogenics Inc.*, [1992] OLRB Rep. Feb. 224). In *Roytec Vinyl Co.*, [1990] OLRB Rep. June 727, the Board commented on this problem in another context:

In the Board's experience, employees are often concerned that they may be subject to such reprisals by their employer for union activity. The Board's jurisprudence is replete with examples of employees who were discharged or penalized in some way, at least in part, because of their support for unionization. For an employee who fears that joining a union will lead to a discharge or other penalty, the result he or she contemplates can be a loss of economic security, the loss of the social milieu of the workplace, a concomitant loss of self-esteem, identity or social standing, the uncertainty of finding another job and the possibility of a slide onto social benefits. Of course, in most cases such a bleak picture will not come to pass; nevertheless, the mere possibility of any of these consequences may exert a powerful influence on an employee contemplating collective bargaining, a regime frequently not welcomed by employers.

66. There is no doubt that commencing or continuing a lawful strike involves exercising rights under the Act. The linking of job loss to such an exercise would thus normally bring these statements within the ambit of sections 65, 67 and 71.

67. However, Red Cross argued that telling employees that they were likely to lose their jobs if they struck amounted to merely advising them of something that would happen as a result of the Home Cares removing the clients. The implication was that this was somehow an inevitable economic consequence of the strike which was beyond the power of Red Cross, and therefore referring to it was simply a prediction of either fact or the conduct of others, rather than intimidation on the part of Red Cross. We do not find this persuasive. The Board has found in a number of cases that where an employer suggests that there will be lessened job security as a result of losing customers or contracts, violations of the Act have occurred. (See for example, *Havlik Technologies Inc.*, [1992] OLRB Rep. April 468, *Stratton Knitting Mills Limited*, [1979] OLRB Rep. Aug. 801, *Loraine Products (Canada) Ltd.*, [1977] OLRB Rep. Nov. 734 and *Bell & Howell Canada Ltd.*, [1968] OLRB Rep. Oct. 695.) Moreover, the Board has also indicated that statements which purport to be predictions of the future may be intimidating if employees will reasonably perceive their employer to have some control over whether those events will or will not occur. (See *Havlik*, *supra*, and *Seven-Up/Pure Spring Ottawa*, [1984] OLRB Rep. Jan. 87.)

68. In this case, we have noted previously that the evidence set out above indicates several of the statements made were not true, either at all or at the point in time they were made. More importantly however, neither the removal of the clients by the Home Cares, nor any subsequent loss of jobs was necessarily inevitable or entirely beyond the influence of Red Cross. On the contrary, when it became apparent that there would be a strike, Red Cross embarked on a course of conduct which virtually ensured that the Home Cares would remove the clients. It made only the most perfunctory moves with respect to exploring the use of homemakers during the strike, and advised at least one of the Home Cares that it would not be able to look after the clients during a strike far in advance of that being apparent. (We should add that the perfunctory approach taken by Red Cross was matched by the relative inertia of the unions in pursuing this issue. In fact, the evidence suggests that both parties were merely going through the motions in this regard with their eyes fixed firmly on the possibility of this litigation.)

69. Red Cross did not ask to keep the clients, never formulated any kind of plan to do so, and did not request that the clients be returned after the strike. When the assignments were made permanent in the case of HW Home Care, it did not protest, and did not even ask why. In other words, to the extent that Red Cross was in a position to influence events, it made choices which would guarantee the removal of the clients. Moreover, there is no dispute that the decision to close the Dundas service was a Red Cross decision, as was the decision to terminate the employment of the Dundas homemakers. Assuming without finding that these decisions were properly motivated, they were still the employer's decisions, not events beyond its control to which it could refer with some kind of impunity.

70. In saying this, we do not ignore the reality that events were also strongly influenced, if not dominated by the Home Cares, who might, for example, have removed the clients regardless of what Red Cross did. We also accept that the use of economic weapons may have some consequences. At the same time, we do not think that Red Cross can justify statements that would otherwise be considered intimidating by suggesting that it was only referring to inevitable economic results caused by third parties, when its own choices figured in bringing about that course of events. The same is true for the assertion by Red Cross that it included these statements in material sent to homemakers because they were entitled to know the facts. As we have observed, whether or not these were the "facts" is not at all clear, and Red Cross had a role to play in whether they became facts or not.

71. Counsel for Red Cross also argued that his client was required to advise the unions that jobs might be lost on the basis of the principles set out in *Westinghouse Canada Limited*, [1980] OLRB Rep. April 577. In that case, the Board was asked to find that the failure of a company to reveal plans to relocate the operation outside the scope of the bargaining unit was a violation of the duty to bargain in good faith under section 15. In this regard, the Board said as follows:

39. Collective bargaining during the prescribed "open period" is the preferred vehicle for establishing terms and conditions of employment in this jurisdiction. With the exception of union recognition and inter-union jurisdictional disputes the scope of matters which may be bargained to impasse in this jurisdiction, as contrasted to bargaining under the *National Labour Relations Act* is virtually unlimited as is seen from the statutory definition of collective agreement. A collective agreement is defined in the Act as an agreement in writing containing provisions respecting terms and conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees and under section 14 of the Act the parties are required to bargain in good faith and make every reasonable effort to make a collective agreement. Once an agreement is reached, however, the parties are bound to it for its stipulated term and are prohibited from engaging in economic sanctions during its terms regardless of changing economic conditions or management initiatives. The restrictions placed upon a trade union in this regard are to be contrasted with the freedom allowed under section 152 of the *Canada Labour Code*, c. L-1 which permits a trade union to bargain to impasse about the effects

of technological change occurring during the term of a collective agreement. Having regard to the importance of the exercise, the requirement for full and open discussion, the scope of matters open to bargaining and the statutory framework which binds the parties to the terms of their agreement for its full term, can there be any doubt that the section 14 duty requires an employer to respond honestly when asked in bargaining if he is contemplating initiatives of the type which have a real likelihood of significantly impacting on the bargaining unit. Similarly, can there be any doubt that an employer is under a section 14 obligation to reveal to the union on his own initiative those decisions already made which may have a major impact on the bargaining unit. Without this information a trade union is effectively put in the dark. The union cannot realistically assess its priorities or formulate a meaningful bargaining response to matters of fundamental importance to the employees it represents. Failure to inform in these circumstances may properly be characterized as an attempt to secure the agreement of the trade union for a fixed term on the basis of a misrepresentation in respect of matters which could fundamentally alter the content of the bargain.

The Board went on to find that section 15 did not require an employer to reveal on his own initiative plans which have not become at least *de facto* decisions.

72. At best, *Westinghouse Canada Limited* is a very awkward fit with facts before us. The evidence indicates that most of the statements referred to above were not made for the purpose of disclosing plans made by Red Cross. The only exception might be the letter of March 5th to Local 204 advising that it was highly unlikely that the Dundas service would re-open, and that a final decision would be reached the following week. Rather, the evidence supports the conclusion that the other statements were made for the purpose of deterring employees from going on strike or staying on strike by suggesting that they would lose their jobs as a result. Moreover, a Westinghouse-type obligation would not explain why these statements were included in letters to individual homemakers rather than the unions. In the circumstances, we do not think that Red Cross can shelter its conduct in this manner.

73. In light of the evidence before us and the Board's jurisprudence, we find that Red Cross violated sections 65, 67(c) and 71 of the Act by making intimidating statements to employees for the purpose of deterring them from exercising their rights under the Act.

74. The applicants also argued that Red Cross contravened the Act by circumventing the replacement worker provisions and thereby effectively destroying the bargaining rights of the homemakers. In counsel's view, Red Cross could have satisfied its own interests without damaging the homemakers' bargaining rights by following the scheme of section 73.2 which provides exceptions to the ban on replacement workers in certain situations. In this regard, counsel relies primarily on the cases of *Webster and Horsfall (Canada) Ltd.*, [1969] OLRB Rep. Sept. 780 and *Humber College of Applied Arts and Technology*, [1979] OLRB Rep. June 520.

75. In *Webster and Horsfall (Canada) Ltd.*, it was alleged that an employer who went out of business during a strike had committed an unfair labour practice. Ultimately the Board found that the company's decision to close, which resulted from a confluence of economic factors including the strike, was not a contravention of the Act. In *Humber College*, *supra*, the Board addressed an alleged violation of section 76 of the *Colleges Collective Bargaining Act*. The employer in that case had permanently contracted out the work of unionized security guards for the purpose of guaranteeing continuity of security during the course of any future strike which might occur. The *Colleges Collective Bargaining Act* permitted guards to strike, but also contained provisions allowing the college to close if its buildings, equipment or supplies might not be adequately protected during a strike. In this context, the Board found that the college had violated the provision in question by contracting out the work because it was afraid that its in-house security guards would exercise the right to strike.

76. There are a number of obvious points of departure between these cases and the facts before us, which we do not intend to belabour. Suffice to say that among other things, we also think it would be untenable to find that the failure by Red Cross to utilize the provisions of section 73.2 was an unfair labour practice in circumstances where: a) we have found that Red Cross was the only employer, and it was not using any replacement workers; b) the applicants conceded that if we found that Red Cross was the only employer and was not using replacement workers, Red Cross was not required to follow the scheme of section 73.2; c) the applicants were not prepared to say at the hearing whether any part of the facts before us would even come within the exceptions to the ban set out in section 73.2; and d) the applicants refused to consent to the use of bargaining unit employees and were as lethargic as Red Cross in utilizing the provisions of section 73.2. As a result, this aspect of the application is dismissed.

77. This brings us to the question of the appropriate remedy for the violations of sections 65, 67 and 71. At the hearing, the parties made arguments with respect to whether we should direct the reopening of the Dundas office. Subsequently, the unions clarified that they had withdrawn that part of their requested relief which related to the reopening of the Dundas office. The only other remedy requested which was not connected to the allegations under sections 73.1 and 73.2 or the unions' Webster and Horsfall argument was a posting. Since employees in this case do not work in one central location, we direct that Red Cross mail the notice attached as Appendix "A" to each employee in the bargaining unit as of March 1, 1993.

78. The responding parties also requested costs. The Board has a well-established policy of not awarding costs for the reasons set out in *Repac Construction & Materials Limited*, [1976] OLRB Rep. Oct. 610. We do not see any reason to depart from that policy in a case of first instance such as this involving complex provisions of the Act, where, among other things, there was a reverse onus on the responding parties.

Appendix "A"

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

AFTER A HEARING IN WHICH BOTH THE CANADIAN RED CROSS SOCIETY ONTARIO DIVISION AND SERVICE EMPLOYEES INTERNATIONAL UNION LOCALS 204 AND 532 HAD A CHANCE TO PRESENT EVIDENCE AND MAKE ARGUMENTS, THE ONTARIO LABOUR RELATIONS BOARD HAS FOUND THAT:

1. THE CANADIAN RED CROSS SOCIETY ONTARIO DIVISION DID NOT VIOLATE THE REPLACEMENT WORKER SECTIONS OF THE LABOUR RELATIONS ACT; AND
2. THE CANADIAN RED CROSS SOCIETY ONTARIO DIVISION DID VIOLATE OTHER SECTIONS OF THE LABOUR RELATIONS ACT BY SUGGESTING OR TELLING HOMEMAKERS THAT THEY MIGHT LOSE THEIR JOBS IF THEY COMMENCED OR STAYED ON A LAWFUL STRIKE.

AS A RESULT, THE BOARD HAD DIRECTED THAT THIS NOTICE BE SENT TO ALL EMPLOYEES TO INFORM THEM OF THEIR RIGHTS:

THE LABOUR RELATIONS ACT GIVE ALL EMPLOYEES THESE RIGHTS:

TO ORGANIZE THEMSELVES INTO UNIONS;

TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A UNION, INCLUDING A LAWFUL STRIKE;

TO ACT TOGETHER FOR COLLECTIVE BARGAINING;

TO REFUSE TO DO ANY AND ALL OF THESE THINGS:

AN EMPLOYER IS NOT PERMITTED:

TO INTERFERE WITH THESE RIGHTS BY USING INTIMIDATION OR UNDUE INFLUENCE TO PREVENT EMPLOYEES FROM EXERCISING THESE RIGHTS;

TO RESTRAIN OR COERCE EMPLOYEES IN ANY MANNER IN THE EXERCISE OF THESE RIGHTS.

This is an official notice of the Board and must not be removed or defaced.

0702-93-U United Steelworkers of America, Applicant v. Royalguard Vinyl Co., A Division of Royplast Limited, Responding Party

Change in Working Conditions - Interference in Trade Unions - Intimidation and Coercion - Unfair Labour Practice - Board finding that installation of video surveillance cameras in workplace motivated, at least in part, by anti-union *animus* - Installation of cameras also violating statutory freeze - Union's complaint allowed and employer directed to remove cameras forthwith

BEFORE: *Laura Trachuk*, Vice-Chair, and Board Members *J. A. Rundle* and *C. McDonald*.

APPEARANCES: *Mark Lewis* and *Brando Paris* for the applicant; *Joseph Liberman* and *Steve Cork* for the responding party.

DECISION OF LAURA TRACHUK, VICE-CHAIR, AND BOARD MEMBER C. McDONALD;
January 10, 1994

1. This is an application under section 91 of the *Labour Relations Act* alleging that the responding party (hereafter referred to as the "company") has violated sections 3, 65, 67, 71, 81 and 82 by installing video surveillance cameras in the workplace subsequent to a union application for certification. The applicant (hereafter referred to as the "union") filed an application for certification in March 1993. That application was the subject of an extended hearing before this panel of the Board and has not yet been completed.

2. In a decision dated October 25, 1993 a majority of the Board found that the company had violated section 81(2) of the *Labour Relations Act* and made the following order and declaration:

... The Board therefore:

- (a) declares that the responding party Royalguard Vinyl Co., A Division of Royalplas Limited has violated section 81(2) of the *Labour Relations Act*; and
- (b) orders that all video surveillance cameras in the workplace which were installed subsequent to the applicant's application for certification be removed forthwith.

The Board reserved its decision with respect to the alleged violations of sections 3, 65, 67, 71 and 81 of the Act. Following are the reasons for finding that the company had violated section 81(2), as well as the Board's decision with respect to the alleged violation of the other sections of the Act.

The Facts

3. The Board heard evidence from eight witnesses. However, there was little dispute about the most relevant facts. The company makes vinyl siding. On the evening of Sunday, April 25 at the weekly shift start-up, it was discovered that there were problems with the twin extruder machine on one of the lines. Problems continued with this machine until Tuesday, April 27, at which time it was taken apart. It was discovered that there was significant damage to the large screws inside the machine, as well as damage to its seals and gears. The twin extruder is the company's most expensive piece of machinery. It concluded that the damage was caused by a piece of metal being pushed through the vacuum vents in the machine, probably while someone was cleaning the vent holes. The purpose of the vacuum is to suck water and foreign materials out of the plastic that is going through the machine. The union did not seriously challenge that there was damage to the machine and that it was caused by a piece of metal having been inserted into it. It

was the company's evidence that the machine operators knew that they were supposed to use plastic tubing to clean the vacuum vents to prevent this sort of accident. It was the union's evidence that some of the machine operators had not been so advised and did not know where to get the plastic tubes which were to be used for that purpose. Witnesses for both parties were in agreement that "Operator C's", that is, operators in training, may not know that they are supposed to use plastic to clean the vents.

4. Later in the week that the damage was discovered, a sign was posted in the workplace at the direction of the company's president indicating that if the company found that this or any other damage was intentional, employees would be subject to discipline up to and including discharge. The president and the controller then discussed putting in video surveillance cameras. They also discussed this option with presidents of other divisions of Royplast who have such cameras. A decision was made to install cameras and a company came in and selected sites for them in consultation with the company's management.

5. The cameras were actually installed on the weekend of May 22 and 23. Later that week the president posted a notice in the workplace advising employees that the cameras had been installed "to avoid recurrence of recent malicious damage caused to machinery and also for general production and safety reasons". The company's president Steven Cork testified that the damage to the machine was extremely costly for the company as the line was down for three weeks, there were four days of maintenance time, plus the cost of the screws, gears and seals. He advised that the controller estimated that the cost of the damage, taking into account all of these factors, was over one hundred thousand dollars.

6. Seven cameras were installed in the production area of the plant. The cameras are only on while employees are working in the plant and they record onto video tape. The tapes are reviewed periodically by the company president to ensure the cameras are working because they tend to get knocked out of focus. It was his testimony that that is his sole purpose in reviewing the tapes at this time. He testified that if there was damage to a machine in future, he would review the tapes to see if there was "improper action", or a lack of training, and whether the damage was intentional or whether it was an accident. It did not appear that there was any intention to review the tapes regularly to determine whether or not employees are using metal to clean the vents in the machines and thereby prevent damage from occurring in advance. The president also testified that part of the reason he put in the cameras was to be able to reassure the owner of the company that he had taken action in view of the cost of the damage.

7. Five of the cameras focus on the actual production lines. One camera focuses on "the crating area" where crates are assembled, that camera also, until recently, recorded the door and the window of the quality control lab. It was the company's evidence that a camera was focused on the crating area because it was concerned about nails from that area getting into the machines. We heard evidence that windows were installed in the door of the lab, as well as the other doors in the plant around May, 1993. A sign was also placed on the quality control lab door saying "authorized personnel only". A number of the union organizers work in the quality control lab and we heard evidence in the certification application hearing that at least one card was signed there. One camera also faces the time clock. The president's explanation for having a camera on the time clock was that it would enable him to identify an employee who may have been photographed on one of the other tapes but is not recognizable.

8. Each operator must fill out a report at the end of each shift so the company always knows who has worked on which line. However, no one in management spoke to any operator who had been working on the damaged line to investigate what had occurred. The president testi-

fied that he did not do so because approaching an employee would be “picking on him” and “accusing him”, and that he was not accusing anyone of anything. In fact, the company’s position throughout the hearing was that it was not claiming that the damage to the machine was intentional or malicious. The president testified that he did and still does trust his employees.

9. An operator had dropped his screwdriver into the vacuum vent hole of a different machine three years previously and it did a similar type of damage, although at that time it actually stopped the machine. That operator was suspended for three days. It was after that incident that the company instituted the requirement to use a plastic tube to clean the machine.

10. The company had installed video surveillance cameras on two previous occasions. Approximately three years ago two cameras were installed in the parking lot after cars had been vandalized. Those cameras were removed one year later because they did not really work. They had actually been installed on the building of a different company of the parent organization which was across the parking lot from the responding party’s building, but both companies had cooperated in installing them. The employees of both companies share the same parking lot. When the cameras were removed from the parking lot, one of them was installed in the company’s lunchroom to prevent vandalism to the vending machines. There had been ongoing vandalism and theft from the vending machines which the company had tried to stop through posting notices and warning employees. The vending machine owner finally threatened to remove the machines and as a result the company promised to put in a surveillance camera. That camera was removed in or about May or June of 1993 as it was incompatible with the new surveillance system. The company has recently had it replaced.

Argument

11. The relevant sections of the *Labour Relations Act* are as follows:

65. No employer or employers’ organization and no person acting on behalf of an employer or employers’ organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer’s freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

* * *

67. No employer, employers’ organization or person acting on behalf of an employer or an employers’ organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

* * *

71. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

* * *

81.-(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 14, in which case subsection (1) applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

* * *

82.-(1) No employer, employers' organization or person acting on behalf of an employer or employers' organization shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten dismissal or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary, or other penalty on a person,

because of a belief that the person may testify in a proceeding under this Act or because the person has made or is about to make a disclosure that may be required in a proceeding under this Act or because the person has made an application or filed a complaint under this Act or has participated in or is about to participate in a proceeding under this Act.

(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall,

- (a) discriminate against a person in regard to employment or a term or condition of employment; or
- (b) intimidate or coerce or impose a pecuniary, or other penalty on a person.

because of its belief that the person may testify in a proceeding under this Act or because the person has made or is about to make a disclosure that may be required in a proceeding under this Act or because the person has made an application or filed a complaint under this Act or has participated in or is about to participate in a proceeding under this Act.

12. The company argued that there was no evidence, nor had the union pleaded any facts, that would substantiate a violation of sections 65, 67, 71 and 82 of the Act. The installation of the surveillance cameras themselves was not a violation of those sections. It submitted that the cameras were not installed for any anti-union reason and that the evidence clearly established that their installation was motivated by business concerns.

13. With respect to section 81(2), commonly referred to as the "statutory freeze", the com-

pany argued first that there was no breach of the Act because no working condition had been breached. Working with or without surveillance cameras was not a working condition in this workplace because there was no “fixed” condition since the security and protection of machines had always resided with management at Royalguard. We were referred to *Re Toronto Transit Commission and Amalgamated Transit Union, Local 113* (1989) 5 L.A.C. (4th) 156 which provides a definition of working condition that we were urged to adopt. The arbitrator in that decision wrote, in part, as follows:

There are three elements in this definition [of working condition]. Firstly, the matter must be “a mainstream aspect” of the parties’ relationship. Secondly, the state of things must have been “fixed in fact for a meaningful period of time”. And, thirdly, “the parties themselves have regarded those matters as fixed and not within unilateral management control”

14. In the alternative, the company claimed that section 81(2) had not been breached because the employer’s actions are consistent with business as usual and with employee expectations. It was argued that in this case the employer is following a pattern which it had established in the past because when property damage had occurred in the parking lot and in the lunchroom, it had installed video cameras. The installation of cameras in the present circumstances, therefore, constitutes business as usual and would be the result employees would expect in the circumstances. We were referred to the following decisions of the Board: *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Jan. 60; *Spar Aerospace Products Limited*, [1978] OLRB Rep. Sept. 859; *Simpsons Limited*, [1985] OLRB Rep. Apr. 594; *Coca-Cola Ltd.*, [1989] OLRB Rep. May 427; *Mohawk Hospital Services Inc.*, [1993] OLRB Rep. Sept. 873. The Board was asked to dismiss the application.

15. The union responded that the installation of the video cameras was a change in the working conditions of the employees. In any case, section 81(2) refers to changes to privileges, and according to the union, working free from video surveillance is at least a privilege. It was noted that no one at the plant had previously been required to *work* under video surveillance, as the prior cameras were in the parking lot and lunchroom where employees did not spend most of their working day. The installation of video cameras in these circumstances would not be within the expectation of the employees, nor was it business as usual for this company. Counsel submitted that the installation of these cameras represents a dramatic difference in the kind, type and purpose of the cameras that had been installed on the two previous occasions and, as a result, cannot be seen as following a pattern set by the employer. Business as usual, in this case, would be the same response as when there was damage to a machine three years before; employees would be trained with respect to how to properly clean the machine, the proper tools would be distributed, an investigation would occur and discipline would possibly follow.

16. The union argued that the employer had violated the other sections of the Act cited in the application because installing the surveillance cameras was an extreme reaction to the incident that allegedly precipitated it. The Board should therefore find that there must have been anti-union motivation for the installation. It was argued that surveillance of this kind is, by its very nature, intimidatory to employees and is a direct violation of the Act. We were referred to the following decisions: *K-Mart, supra*; *Simpsons Limited, supra*; *Re Puretex Knitting Co. Ltd. and Canadian Textile and Chemical Union* (1979) 23 L.A.C. (2d) 14; *Re Thibodeau-Finch Express Inc. and Teamsters Union, Local 880*, (1988) 32 L.A.C. (3d) 271; and *Anderson’s City Farm Valu-Mart*, [1987] OLRB Rep. Jan. 1.

Decision

17. Both parties referred us to paragraphs 32 and 33 of the *Simpsons Limited* decision

which they suggested outlined the Board's current approach in cases where a violation of section 81(2) is alleged. Those paragraphs read as follows:

32. Reasonable expectations language has appeared in a number of decisions dealing with the freeze section. See, for example, *Corporation of the Town of Petrolia, supra*; *Scarborough Centenary Hospital, supra*; *Oshawa General Hospital, York-Finch Hospital, supra*; *St. Mary's Hospital*, [1979] OLRB Rep. Aug. 795 (Decision omitted from [1979] OLRB Rep. March); *AES Data Limited* [1979] OLRB Rep. May 368. In the latter case, for example, the Board found that the employer was entitled to re-assign job functions since the employees could not reasonably expect to continue performing their jobs in exactly the same way despite changes in the mode of production and market conditions. Thus, in the Board's view, the reasonable expectations of employees as the appropriate measure of the employees' privileges which are protected by the freeze is a common thread running through the earlier decisions. In the instant case, the Board is expressly articulating the test.

33. The reasonable expectations approach clearly incorporates the practice of the employer in managing the operation. The standard is an objective one: what would a reasonable employee expect to constitute his or her privileges (or, benefits, to use a term often found in the jurisprudence) in the specific circumstances of that employer. The reasonable expectations test, though, must not be unduly narrow or mechanical given that some types of management decision (e.g., contracting out, workforce reorganization) would not be expected to occur every day. Thus, where a pattern of contracting out is found, it is sensible to infer that an employee would reasonably expect such an occurrence during the freeze. The Board in *Simpsons, supra*, although the cleaning was contracted out before the company itself took over that operation, did not conclude there was such a pattern.

18. It was suggested that the "reasonable expectations" approach modified the Board's "business as usual" or "business as before" approach. The reasonable expectations of employees would be considered in assisting the Board to understand what constituted the employer's "business as before" or vice versa. The "business as before" approach was described in *Spar Aerospace Products Limited, supra*, at paragraph 23:

23. The "business as before" approach does not mean that an employer cannot continue to manage its operation. What it does mean is simply that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union. The right to manage is maintained, qualified only by the condition that the operation be managed as before. Such a condition, in our view, cannot be regarded as unduly onerous in light of the fact that it is management which is in the best position to know whether it is in fact carrying out business as before. This is an approach, moreover, that cuts both ways, in some cases preserving an entrenched employer right and in other cases preserving an established employee benefit.

19. The Board considers what the employer's "business as before" was or what the "reasonable expectations" of the employees are, if there is uncertainty as to what the "rates of wages or any other term or condition of employment, or any right, privilege or duty of the employer, the trade union or the employees" are in a particular situation. "Business as usual" or "reasonable expectations of the employees" are not substitutes for the language of section 81(2), they are approaches the Board has used to interpret the language of that section in the face of ambiguous facts.

20. When utilizing these approaches, the Board considers the event alleged to be a breach of the freeze in the context of the workplace and, where there has never been a collective agreement, in light of a history of events between the employer and the employees seeking to be unionized which might be related. The Board considers what, in light of that history, the employees

would reasonably expect in the circumstances, and part of that consideration is what constituted “business as before”.

21. The majority does not find that the installation of video surveillance cameras would be within the employees’ reasonable expectations of what would occur in the event that there was damage to one of the extruder machines of the nature described above. Notwithstanding the notices it posted to employees, the company is not alleging that there was sabotage or malicious damage to the machine. It has accepted that the damage may have been caused accidentally and the president has asserted that he trusts his employees. The majority does not find that employees would expect that they would be subject to video surveillance as a result of such an accident. The last time that such an accident occurred, an employee was suspended for three days and training with respect to cleaning the machines was provided. Employees would reasonably expect the same kind of approach in these circumstances. They would anticipate that there would be an investigation and some attempt at determining how the damage had specifically been caused and perhaps discipline would follow. They may also expect the company to embark on further training on how to clean the machines.

22. The fact that video cameras had been installed three years before in the parking lot and removed a year later, and that there had been a video camera in the lunchroom, does not establish a pattern that would lead employees to believe that video cameras would be installed throughout the workplace in the event that an incident such as this occurred. Nor does the fact that those cameras had been installed lead to the conclusion that the installation of such cameras would be business as before for the company in these circumstances. The previous cameras were not installed in places where employees actually worked. It is not even clear, therefore, that they could be a condition of work. In any event, it is a very different matter to subject oneself to video surveillance if one chooses to use the lunchroom than to be subjected to it the entire time one is actually working. Furthermore, the camera was only installed in the lunchroom as a last resort after the company had attempted other methods of curbing the vandalism. In these circumstances, the company did not attempt to take any other action first. Employees would also not expect that they would be subjected to constant video surveillance of their work if a machine were damaged as a result of one year of parking lot surveillance.

23. The majority does not accept the company’s argument that the presence or absence of these cameras was not a working condition at all. The kind of monitoring an employee experiences is one of the conditions under which he or she works. The condition of working under the constant surveillance of a video camera is a significantly different condition from working without one. Employees expect to be subjected to supervision, and an employer certainly has the right to exercise supervision over employees. However, the kind of supervision provided by human beings does not intrude on an employee’s privacy and dignity in the same way as having his or her every move recorded on videotape. When being supervised by human beings, one can always find the opportunity to scratch one’s nose or share a joke with a co-worker without the fear that these actions will be recorded on videotape and reviewed sometime in the future. The electronic eye may also change the relationship between an employee and his or her supervisor who is also subject to surveillance.

24. It is not useful to consider, as the company suggests, whether the parties have regarded this matter as fixed and within unilateral management control, since prior to an application for certification, all terms and conditions of employment are within unilateral management control, except for those prescribed by statute.

25. If working without video surveillance is not a “working condition”, it is certainly a priv-

ilege and therefore subject to the freeze under section 81(2). A “privilege” has been described as “a benefit received by employees to which they have no legal claim” (see *Oakville Lifecare Centre*, [1993] OLRB Rep. Oct. 980). In *St. Mary’s Hospital*, [1979] OLRB Rep. Aug. 795 the Board wrote at paragraph 10 as follows:

Section 70(2) preserves not only the employees’ terms and conditions of employment, but also *privileges* which, by reason of custom and practice, have become a part of the employment relationship. The term ‘privilege’ is extremely broad and extends to all of those benefits which an employee is accustomed to receiving but to which he is not legally entitled, and which cannot, therefore, be considered a ‘right’. In order to determine whether a particular benefit, or aspect of the employment relationship, has become a privilege, it is necessary to examine the circumstances of each particular case since privileges can arise from established custom, practice, or policy. The question is an evidentiary one for, by definition, the Board’s consideration must be beyond the strictly legal incidents of the relationship (‘rights’) and include those aspects of the relationship which give rise to ‘privileges’.

Therefore, even if employees cannot call upon any statutory or common-law right not to be subjected to video camera surveillance while they are working, it is a beneficial aspect of their employment relationship which has become established in this workplace by custom and practice.

26. The majority also finds that the company violated sections 65, 67, 71 and 82(1) of the *Labour Relations Act*. It is satisfied that the installation of the video surveillance cameras was motivated at least in part by anti-union animus. This conclusion has been reached after considering the following factors: the installation of the cameras is an unusual and extreme reaction to the circumstances which allegedly precipitated it; the timing of the installation and the placement of the cameras.

27. The installation of the video cameras within two months of an application for certification and during a highly-contested hearing into that application would have an intimidatory impact on employees and interfere with their ability to exercise their rights under the Act. Surveillance, in any context, has an intimidatory effect. To introduce it at this particular time, and in circumstances where, in the past, other responses have been used, would likely suggest to employees that the employer was interested in the “new” activity in the workplace, i.e., the union activity. The connection is unlikely to be lost on employees and is likely to interfere with their ability to freely exercise their rights under the Act. The company is taken to have intended this anticipated reaction. The Board has had occasion to consider the effect of surveillance on employees in the context of the vulnerable period prior to certification in previous cases. In *K-Mart Canada Limited (Peterborough)* it wrote, in part, as follows:

70. Individuals who are aware of surveillance being conducted by authorities against a legitimate activity may come to redefine the activity as being somehow illegitimate and tend to avoid any association with it. Alternatively, even if an individual who is aware that another is under surveillance does not develop a personal antipathy to that person’s activity, he may nevertheless dissociate himself from the victim of surveillance if only to avoid the stigmatization that tends to attach to anyone who is knowingly being investigated. In one of the earliest studies on contemporary surveillance the authors drew the following conclusion:

[t]he hazards of *being* investigated - even if one is subsequently cleared - are so great that individuals are induced to limit their behaviour by avoiding (or trying to avoid) anything that might conceivably arouse anyone’s suspicion and thus lead to charges and an investigation. (Johoda and Cook, *Security Measures and Freedom of Thought*, 61 Yale L.J. 296-333 (1952)).

71. In the instant case the fact that surveillance of O’Connor and Clark was restricted to the store’s premises would not necessarily limit the impact of surveillance to that location. The fear of surveillance can have a spill-over effect into union meetings and private encounters off the

employer's premises. Employees who know that surveillance is being conducted at the work place can never be certain that it is not going on elsewhere. Askin, in *Surveillance: The Social Science Perspective* (4 Columbia Human Rights Law Review 59 (1972) at p. 73) relates the following observation from a study made by a team of social and behavioural scientists:

Actual surveillance of an individual or group or of a particular event, political or otherwise, is not an essential element for chill to occur. With public knowledge that surveillance ...has occurred and is continuing to occur, the individual's perception of the actual event has been influenced. Based on the expectation that surveillance might be going on, people exhibit the same verbal inhibitions as if they were certain through direct knowledge that a surveillance agent were present.

28. In these circumstances, the cameras were not only focused on the machines but also on the time clock and on the door and window of the quality control lab. The Board is not satisfied that it was mere coincidence that a window was placed in the door of the lab almost simultaneously with the installation of the cameras and the presentation of evidence about union activity in the lab. Whether or not the tapes of this camera were actually reviewed, the union organizers working in the lab would know that their actions were being recorded and this would have an intimidatory effect.

29. As noted above, the determination that the company violated sections 65, 67, 71 and 82(1) is also informed by the fact that the company did not respond to the damage to the machine as it had in the past. No investigation was even attempted. The installation of seven video cameras, two of which are not even focused on the machines, is an unusual and extreme reaction in these circumstances, which leads the Board to conclude that the decision to install them was made partly for anti-union reasons. The company argued that it responded differently to the damage in this case because in the prior situation the worker came forward and "confessed". This explanation is not convincing because in the prior instance, the machine actually stopped, so the worker had to admit to his error. In this case, the company did not even ask any employee if anything had happened while he was cleaning the machine.

30. For all of the above reasons, the majority ordered, in its decision of October 25, 1993, that all video surveillance cameras in the workplace which were installed subsequent to the applicant's application for certification be removed forthwith. We also hereby declare that the company has violated sections 65, 67, 71 and 82(1) of the *Labour Relations Act*.

31. We will remain seized with respect to any matters that arise with respect to the implementation of this award.

DECISION OF BOARD MEMBER J. A. RUNDLE; January 10, 1994

1. The Board in a majority decision dated October 25, 1993, found that the company had violated section 81(2) of the *Labour Relations Act*. The present decision provides the reasons for finding the company had violated section 81(2) as well as the reasons the majority found the company had violated sections 65, 67, 71, and 82(1) of the Act. With respect I dissent from the decision of the majority.

2. The respondent has requested the Board reconsider its ruling with respect to the violation of section 81(2) of the Act. In order for the respondent to pursue its request for reconsideration, the reasons for the Boards' findings are required. Due to the need for expedition in this matter, I will provide at a later date more detailed reasons for my dissent. At this point, suffice it to say, I disagree with the majorities characterization of a number of the facts in the case and the con-

clusions to be drawn from those facts. I also disagree with the conclusions drawn from a review of the case law in this area.

3. The respondent has a right and obligation to protect its property from damage. By protecting its property, it also safeguards the jobs of its employees. I would have ordered the company to remove only those cameras *not* focused on the production area. I would also not have found a violation of sections 65, 67, 71, and 82(1).

4. As stated earlier, full reasons for my dissent will be issued at a later date.

2455-93-G United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 663, Applicant v. Sarnia Wolverine Manufacturing Ltd., Responding Party

Adjournment - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Parties - Practice and Procedure - Board rejecting employer's motion that Board defer consideration of grievance to allow it to file jurisdictional dispute complaint - Board noting that parties had not addressed whether employer's unrepresented labourers, Labourers' union, or other contractors have status to intervene in the proceeding

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *D. A. MacDonald* and *G. McMe-nemy*.

APPEARANCES: *James Fyshe* and *Bob Humphries* for the applicant; *R. A. Werry* for the responding party.

DECISION OF THE BOARD; January 31, 1994

I

1. This is a referral of a grievance to arbitration pursuant to section 126 of the *Labour Relations Act* ("the Act").

2. The responding party ("the employer" or "Sarnia Wolverine") has made a motion that the Board defer consideration of this grievance to allow Sarnia Wolverine to file a jurisdictional dispute complaint under section 93 of the Act. The applicant ("the trade union", "the U.A." or "U.A. Local 663") objects to such deferral and asserts, *inter alia*, that section 93 is not intended to apply to the present circumstances.

II

SUBMISSIONS

3. It is not disputed that Sarnia Wolverine was engaged to perform certain work at the Dow Chemical plant. That work has now been completed. The parties disagreed about the description of that work. Their disagreement about the nature of the work performed by Sarnia Wolverine provides some insight into the existing dispute.

4. The trade union characterizes the work performed as part of the renovation and upgrading of a piping system. The U.A. asserts the work was “removal and replacement” work. According to the trade union the work involved the removal of an old piping system, the drilling of inserts for the installation of a new pump, the rigging and setting of a pump and tank, and the fabrication and installation of new pipe used in the system. Although the employer employed members of U.A. Local 663 to fabricate and install the new pipe, it did not employ U.A. Local 663 members to remove the old piping system, drill the inserts, or to perform the rigging and setting. The trade union asserts this work is covered by the collective agreement to which Sarnia Wolverine is bound. Pursuant to the terms of that collective agreement the work should have been assigned to members of U.A. Local 663.

5. The relief claimed in the grievance by the trade union is for a declaration that Sarnia Wolverine has violated the applicable collective agreement, a direction that Sarnia Wolverine cease and desist from such violations and “payment of damages to U.A. Local 663 in an amount equal to the wages and benefits which would have been paid to employees of the company in the U.A. Local 663 bargaining unit had the provincial agreement not been violated”. At the hearing counsel for the trade union estimated that the amount of damages involved approximately seventy-six hours of work

6. Counsel for the employer disagreed with both the trade union’s characterization of the work and the number of hours involved in the performance of the work. Sarnia Wolverine asserts the disputed work is properly characterized as the “demolition” of a piping system and involved the employer in engaging employees to cut-up and throw into the garbage portions of pipe removed by those employees. The employer states that the work did not involve “removal and/or relocation” but rather was “removal for scrap” (or as counsel put it “removal into the garbage”) and not removal for reuse or replacement. The system removed was replaced by an entirely different system which was installed by members of U.A. Local 663. The employer asserts that such removal for scrap is not covered by the collective agreement. It submits that in accordance with its own and local area practice the work was properly assigned to its employees who are general labourers. Sarnia Wolverine takes the position that the prevailing practice in the Sarnia area is for employers to assign this type of work to its complement of labourers. In addition the employer estimates that the work which forms the basis of the grievance involved approximately fifteen hours of work.

7. It is useful to set out both the collective agreement and statutory provisions which are applicable. Article 9 of the collective agreement states:

ARTICLE 9 - TRADE OR WORK JURISDICTION

9.1 The parties to this Agreement recognise that it is the employer’s sole responsibility to assign work. The contractor shall not assign work contrary to existing area practices predicated on jurisdictional wording outlined in other trade Collective Agreements. The reference herein, to area practices and/or jurisdictional awards must be area practices and/or awards that have been accepted and practised on projects between Unions.

9.2 Jurisdictional disputes that may arise after the enforcement of this agreement shall be referred to either the Ontario Labour Relations Board (O.L.R.B.) or the Impartial Jurisdictional Dispute Board (I.J.D.B.) or a Successor Group, for a final binding decision.

9.3 Subject to the conditions contained in Clause 9.1 and 9.2 above, and subject to jurisdictional Agreements between the trades, decisions of record, and local area practice, this Agreement covers the unloading, distribution and hoisting of all equipment and piping for plumbing and/or pipe fitting systems, and the fabrication, installation and handling of all plumbing and/or pipe fitting and industrial process control systems including all hangers and supports. Without limit-

ing the generality of the foregoing, this agreement covers the installation of new piping systems and related equipment, the maintenance and repair of all piping systems and related equipment, and the removal and/or relocation of all piping systems and related equipment for the purpose of renovation, retrofit, reconstruction, replacement or relocation. Where no work claim dispute exists, the original assignment of the above works shall be to the United Association.

Article 11, and Article 101 of the Appendix applicable to U.A. Local 663, place the following requirements on the employer:

ARTICLE 11- SUB-CONTRACTING

11.1 Recognizing that the Contractor can sub-contract, no Contractor shall directly or indirectly sublet or sub-contract or otherwise transfer to any employee or any other employer not signatory to a U.A. agreement any of the work coming under the jurisdiction of this agreement.

ARTICLE 101 - ZONE 5 SARNIA - LOCAL UNION HIRING

The Employer agrees that he will not hire anyone who is not a member of Local Union 663 for any work coming under the jurisdiction of U.A. and that no member of Local Union 663 will be hired without a work referral slip from the Union Office. The Union agrees that when it has no members available it will issue a work card to men deemed qualified by the Employer until such time as there are Local Union 663 men available who are capable of doing the work required by the Employer.

The relevant provisions of section 93 of the Act state:

93.- (1) This section applies when the Board receives a complaint,

- (a) that a trade union or council of trade unions, or an agent of either was or is requiring an employer or employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another; or
- (b) that an employer was or is assigning work to persons in a particular trade union rather than to persons in another.

8. Sarnia Wolverine submits that the issues raised in the grievance are in the nature of a jurisdictional dispute. It asserts that having established a *prima facie* case that this is a jurisdictional dispute the Board ought not to hear the grievance but should defer consideration of the section 126 referral to allow the filing and resolution of a jurisdictional dispute under section 93 of the Act. The employer argues that the fact that the labourers which it employs and to whom it assigned the work are not represented by a trade union or are not covered by a collective agreement does not alter the essential jurisdictional nature of this dispute. It is this fact, that Sarnia Wolverine labourers are not represented by a trade union and are not covered by a collective agreement, which make the present circumstances unique.

9. The position of Sarnia Wolverine in relation to the grievance is essentially twofold. Its principle assertion is that the work is not covered by the Provincial Collective Agreement to which it is bound together with U.A. Local 663. Both in the alternative and as a corollary to that position Sarnia Wolverine argues that *if* the work does fall within the parameters of the work jurisdiction of the union as set out in collective agreement, the work also falls within the trade jurisdiction of the "labourers trade" and has in the past been assigned by this employer to persons in the "labourers trade" without objection by the Union. Moreover, in the Sarnia area this work is routinely assigned by employers to their employee "labourers" regardless of whether such labourers are represented by the Labourers International Union of North America ("LIUNA") or not, without

apparent complaint from the U.A. and notwithstanding that the employer may be bound to recognize the bargaining rights of the U.A..

10. Counsel asserts that in light of this practice (both this employers' own past practice and the area practice) it is evident that the root of this grievance involves the correctness of a work assignment, and that is what jurisdictional disputes are designed to resolve. The employer argues that in the circumstances therefore the resolution of the work assignment issue should include the participation of, and be binding on, all interested parties including in this case the unrepresented labourers employed by Sarnia Wolverine, the LIUNA whose members (it is asserted) have traditionally performed this work in the Sarnia area, and those contractors who have collective bargaining relationships with the LIUNA and the U.A. together with their respective designated employer and employee bargaining agencies. Whether or not this type of "demolition" work is covered by the U.A. Provincial Agreement is significant to each of these persons or parties and will affect ongoing relationships. Counsel on behalf of Sarnia Wolverine submits that it is therefore appropriate and necessary that all parties be before the Board to participate in the proceedings and obtain a ruling which, he states, will have a significant impact on the construction industry in the Sarnia area.

11. From a more technical perspective counsel for the employer argues that the language of section 93 does not limit its applicability only to disputes in which the employees to whom the work was assigned are represented by a trade union. (Similarly the statutory language does not limit its applicability to disputes between unions having collective bargaining rights with the employer. See for example *Piggott Construction Limited*, [1992] OLRB Rep. June 748). Counsel submits that the substance of this grievance is, to use the language of section 93(1)(a), that "a trade union [U.A. Local 663]... was or is requiring an employer [Sarnia Wolverine]... to assign particular work to persons in a particular trade union or in a particular trade, craft, or class [the U.A. or the plumbing craft] rather than to persons in another". In this instance the "another" is a "class" of unrepresented labourers employed by Sarnia Wolverine.

12. Counsel for the trade union submits that the purpose of the jurisdictional dispute provision of the Act is to resolve disputes and work assignment conflicts which involve the competing interests of competing trade unions or crafts. Where there are competing claims to the work and one trade union files a grievance which claims the work for its members, the other trade union has no standing to participate in the grievance procedure or arbitration process. The vehicle or mechanism for resolving what is then essentially a three party dispute is a jurisdictional dispute complaint filed pursuant to section 93 of the Act. That vehicle or mechanism however is not appropriate where, as here, there is no other third party complaining about the work assignment or claiming the work. Counsel argues that the employer cannot be "paternalistic" by in effect saying that the work is being "claimed" by the unrepresented labourers in its employ. He also notes that the Board has not in the past adjourned grievances which did not involve another trade union claiming the work.

13. Counsel for U.A. Local 663 submits that the issue raised by the grievance is whether the work falls within the jurisdiction of the union as defined in the collective agreement. That issue is properly addressed through the interpretation of the collective agreement. Counsel notes that the Board's jurisdiction to inquire into a jurisdictional dispute complaint filed under section 93 is discretionary. He urges the Board not to exercise that discretion in a manner which could "subvert" the purpose and intent of section 126 of the Act to provide an expeditious, less expensive resolution of construction industry grievances. He submits that the issues raised in this instance *can* be dealt with within the context of the grievance and the application and interpretation of the collective agreement which binds both parties. Any arbitral award arising out of this grievance would not

bind any third party trade union such as the LIUNA. It is therefore neither necessary nor appropriate to require that this referral of a grievance be deferred so as to enable notice to be given to the LIUNA or to encourage their participation or those of any other party.

14. Finally, counsel for the union takes the position that the language used in section 93 indicates that this statutory provision does not apply to the present circumstances. In this regard counsel notes that U.A. Local 663 is not “requiring” the employer to assign particular work to it. Rather, U.A. Local 663 seeks merely to enforce the contractual obligations of the employer. In addition, counsel argues that the words “rather than to persons in *another*” must be read in context. Taken in context “another” cannot mean merely another group of persons. Similarly another “class” can not merely mean another group of persons, but must, having regard to the context and purpose of section 93, refer to an entity similar to the “trade” or “craft” entities which precede the word “class” in section 93. The work which underlies this grievance was not performed by another trade, or craft, or class of persons who could be similarly characterized. Rather the work was performed by an unrepresented group of general labourers outside of any bargaining unit.

III

DECISION

15. There is nothing in the statutory language used in section 93 which limits the applicability of that provision to instances where the work assignment dispute involves competing claims of trade unions on behalf of their members. The language does not require that the employees to whom the work was assigned be represented by a trade union or a craft before there can be said to be a “jurisdictional dispute”. The statutory language refers specifically to persons in a “trade, craft or class”. We do not agree that “class” must refer to an entity which is similar in nature to a trade union or a craft. Thus we do not accept the trade union’s assertion that section 93 cannot be applied to the present circumstances.

16. This grievance arises out of a dispute about the correctness of the employer’s work assignment. There is a dispute as to whether the work should properly have been assigned to members of U.A. Local 663 or to the employers’ unrepresented labourers. There can be no doubt that *if* those labourers had been represented by the LIUNA or another trade union which asserted jurisdiction over this work, the preconditions set out in section 93 would be met. One trade union (the U.A.) would then be requiring the employer to assign particular work to persons in its particular trade union rather than to “other” persons or persons in another trade union. As counsel for the employer noted, those circumstances suggest a “classic” jurisdictional dispute. Having regard to the specific language of section 93 the fact that those “other” persons are not represented by any trade union does not affect the applicability of that section.

17. We do not accept the trade union’s assertion that it is not “requiring” the employer to assign particular work to its members but seeks merely to enforce the terms of its collective agreement with the employer. In all of the circumstances the grievance filed by the U.A. and the relief requested is a demand by the trade union which in practical terms “requires” that the employer assign particular work to it. Commons sense indicates that given the way in which the construction industry operates, in practical terms the U.A. has made a demand for the work of the employer. An employer in the construction industry is unlikely to assign particular work, or to continue to assign particular work or future work, to another group of employees (whether represented by a trade union or not) in the face of such a grievance and thereby run the risk that if the grieving trade union is successful it will in effect have paid twice for the work to be performed - both as wages to its employees and as damages to the grieving trade union. (For a similar analysis involving the subcontracting obligations of a general contractor where it subcontracts work to a contractor which

does not have a contractual relationships with the grieving union see *Robertson Yates*, [1992] OLRB Rep. Apr. 507).

18. To summarize therefore we are satisfied that section 93 *can* be applied to the circumstances of this case and that the Board has the jurisdiction to entertain the dispute as a jurisdictional dispute under the provisions of section 93. Having regard to the circumstances and the language of section 93(1) we are satisfied that there exists a jurisdictional dispute within the meaning of section 93(1). The U.A. was or is requiring the employer to assign particular work to persons in its particular trade or craft rather than to persons in another "class".

19. This conclusion however does not end the matter or dispose of the motion. The issue raised in the motion is *not* whether there exists a jurisdictional dispute or whether the Board has the jurisdiction to entertain the dispute between these parties as a jurisdictional dispute complaint under the provisions of section 93 of the Act. Neither is it an issue as to whether the Board *will* exercise its discretion under section 93(1) and actually entertain the dispute if filed. Our conclusion is only that the Board *has* the discretion to hear the dispute as a jurisdictional dispute complaint because the facts fall within the ambit and statutory language of section 93. The issue before us however is whether the Board should defer consideration of *this* referral of a grievance pending the filing and resolution of a jurisdictional dispute complaint which the employer has undertaken to file.

20. We commence consideration of that issue with the observation that *prima facie* a referral of a grievance should proceed unless there are good reasons why the adjudication of that grievance should be deferred until another matter has been resolved. Section 126 of the Act is intended to provide parties in the construction industry with an expeditious and relatively inexpensive means of resolving disputes. To defer consideration of a grievance to another matter can defeat that intended expedition.

21. Certainly the Board has the power to determine its own practice and procedure subject to the parties having an opportunity to present evidence and make submissions. That power includes the power to decide whether or at what stage of this proceeding the Board will determine to defer consideration of the grievance pending resolution of another matter.

22. The Board will not, as a matter of course or automatically defer the adjudication of a grievance pending the adjudication of a jurisdictional dispute complaint unless or until it is appropriate to do so. In this regard we note that the Board has on various occasions in the past exercised its discretion and refused to do so (see for example *Schindler Elevator Corporation*, [1990] OLRB Rep. Oct. 1092, *Vic-West Steel Limited*, [1991] OLRB Rep. Jan. 111, *Ontario Hydro*, unreported December 20, 1991, Board File 2627-90-G). In *PCL Constructors Eastern Inc.*, [1991] OLRB Rep. Mar. 354 the Board commented on its practice with respect to the deferral of the consideration of a grievance stating at pages 355 and 356:

• • •

As the Board observed in *Schindler Elevator Corporation*, *supra*, the Board has, in the interests of labour relations stability, adopted a broad approach to jurisdictional disputes such that, once satisfied that it has the jurisdiction to do so, the Board will generally hear a complaint concerning work assignment on its merits as such. It is not uncommon for a grievance to raise an issue which is essentially or substantially a jurisdictional dispute. When a complaint under section 91 [now section 93] is filed, or is contemplated, with respect to the same assignment of work which is the subject of the grievance which has been referred to it, the Board is faced with deciding how the dispute is best resolved. The purpose of section 124 [now section 126] is to provide an expeditious mechanism for resolving grievances in an industry in which the nature of the work and the structure of labour relations often renders ineffectual the kind of arbitration provisions

typically found in collective agreements. On the other hand, section 91 is specifically designed to be the primary means by which jurisdictional disputes are to be resolved. Accordingly, although there may be circumstances in which it is not appropriate to do so, the Board will often defer consideration of a grievance until a (*bona fide*) jurisdictional dispute relating to the same assignment work has been resolved. When faced with that kind of situation, the Board has generally concluded that a grievance can constitute a demand for the work in question (*Eaman Riggs Limited*, [1978] OLRB Rep. March 228, *Napev Construction Ltd.* [1979] OLRB Rep. Sept. 886, *Pre-Con Company (A Division of St. Mary's Cement Limited)*, [1981] OLRB Rep. July 947, *Ontario Hydro*, [1982] OLRB Rep. March 428). A jurisdictional dispute complaint need not be dispositive of a grievance before the Board will confer consideration of the latter. ...

8. The Board's decisions in *Schindler Elevator Corporation*, *supra*, and *Vic West Steel*, *supra*, indicate that the Board is concerned about the direction that the jurisdictional dispute process before it has taken. We agree with the comments made in those decisions in that respect. It should be evident that the Board intends to give careful scrutiny to request that a proceeding be deferred or adjourned pending the disposition of a jurisdictional dispute. *A party making such a request must satisfy the Board both that the matters in issue in a proceeding do raise a jurisdictional dispute and that it is appropriate for them to be determined under section 91 of the Act using the Board's jurisdictional dispute procedure before a section 124 referral, for example, is allowed to proceed. This does not mean that it will be the Board's general practice to either defer or not to defer to the jurisdictional dispute process. Each case merits individual consideration in that respect.*

(emphasis added)

23. In this instance we are not satisfied that it is appropriate at this stage to defer consideration of the issues raised in the grievance, including those issues which may raise a jurisdictional dispute, to the jurisdictional dispute complaint process under section 93 of the Act. We are satisfied that the issues raised in the grievance *can* be dealt with through the grievance and arbitration proceedings. In particular we note that *if* the employer succeeds in its assertion that this work is not covered by the U.A. Provincial Agreement to which it is bound, the grievance will be dismissed and, there being no other demand for the work in question, there would be no jurisdictional dispute within the meaning of section 93 of the Act. Thus, there are issues upon which the Board can adjudicate within the context of this referral of a grievance which may be dispositive of the jurisdictional dispute. Moreover, within the context of the grievance referral there are issues upon which the Board can adjudicate which do not involve jurisdictional dispute matters, and the resolution of those issues may mean that a jurisdictional dispute no longer exists.

24. It is true that if the employer's assertion that this work is not covered by the U.A. Provincial Agreement proves to be incorrect a jurisdictional dispute *may* continue to exist. That is to say there *could* continue to be a dispute between two competing groups of employees - one group consisting of persons in a particular trade union or in a particular trade or craft (the U.A.) and another group consisting of another class of persons (the unrepresented general labourers) - concerning the entitlement or claim of each group to the work. A finding that the work is covered by the U.A. Provincial Agreement however does not impair the ability of the Board to determine that dispute in the event the Board exercised its discretion to entertain any complaint filed under section 93. Indeed, an adjudication by the Board that the work in dispute *is* covered by the U.A. provincial agreement (and perhaps any other findings of fact which the Board may make in the section 126 referral) may assist the Board if it entertains a jurisdictional dispute complaint filed at some later point in time because it would be unnecessary then to relitigate the issue of whether the U.A. has any claim or entitlement to the work pursuant to the terms of the U.A. provincial agreement. The litigation of that issue may also be of assistance to these two parties in their presentation of their case if a jurisdictional dispute complaint is subsequently filed and entertained by the Board.

25. Notwithstanding the fact that the grievance may have jurisdictional implications, we

find that this dispute is primarily or essentially one regarding the interpretation of a collective agreement. The present circumstances do not disclose any reasons why this matter should be deferred to the jurisdictional process under section 93 of the Act. Indeed one could argue that the intent of section 93 is to fashion remedies which will lessen work assignment disputes in the construction industry. Certainly, in the past, the Board has adjudicated upon jurisdictional disputes primarily to resolve problems between trade unions, and to deal with issues where an employer contractor is faced with inconsistent and competing obligations to different trade unions. In the present circumstances the effective result of acceding to the employer's request to defer consideration of the grievance may be to increase the opportunity for jurisdictional disputes in the construction industry. The hearing of any grievance which involves an allegation that bargaining unit work was performed by persons who were not members of the bargaining unit could be delayed by reason of the employer's assertion that the grievance raises the spectre of a work assignment dispute between two competing groups or classes of employees. In instances where that dispute may be effectively adjudicated upon within the section 126 referral it is not appropriate to defer consideration of the 126 referral notwithstanding the jurisdictional overtones of the grievance.

26. On the basis of the material and submissions before us, and in the absence of any representations regarding this dispute from either the group of unrepresented labourers of Sarnia Wolverine who performed the work, or anyone else who may assert a claim to the work, we do not consider it appropriate to defer the grievance filed by U.A. Local 663.

27. This leads us to the issue of "notice" and the application and affect of the decision of the Supreme Court in *Canadian Union of Public Employees v. Canadian Broadcasting Corporation et al*, [1992] 91 D.L.R. (4th) 767 n. (S.C.C.) affg [1990] 70 D.L.R. (4th) 175. Counsel for the employer submitted that neither the group of unrepresented labourers employed by Sarnia Wolverine or the LIUNA had notice of these proceedings and therefore they had no opportunity to make submissions regarding the jurisdictional aspects of the grievance.

28. First we note that neither the union nor the employer referred to any of these groups as persons "who may be affected by the referral" in paragraph 2 of their application or response. The Board therefore could not provide notice to these "persons" as it had no knowledge of their purported interest. In keeping with its usual practice, and in light of the fact that the designated employee and employer bargaining agencies (EBA) are parties to the collective agreement the Board did give notice of this proceeding to those two entities. Neither EBA chose to participate in this proceeding.

29. In dealing with any referral of a grievance pursuant to section 126 of the Act the Board is adjudicating in its capacity as a Board of Arbitration. In arbitration proceedings it is the responsibility of the parties to ensure that notice of the proceeding is given to any other interested person. The Board of Arbitration would have no knowledge of any other person who has an interest in the proceedings or who may be affected by the proceedings unless it had been advised of that interest by the parties. Thus, in arbitration proceedings if either party considers it necessary or appropriate to give notice of these proceedings to any other "interested" or "affected" party the obligation to do so falls upon that party.

30. The parties did not make representations on the effect, if any, of the decision of the court in *Canadian Union of Public Employees v. Canadian Broadcasting Corporation et al*, *supra*. The parties have not addressed whether either the employer's unrepresented labourers, the LIUNA, or other contractors have a legal interest in *this* proceeding and/or whether they have status to intervene or standing to participate in this matter should they desire to do so. We therefore make no decision with respect to those issues.

31. In the result the employer's request that this referral be adjourned or deferred pending the filing and resolution of a jurisdictional dispute complaint under section 93 is dismissed. The Registrar is directed to list this matter for hearing. This panel is not seized.

3765-92-R Communications, Energy and Paperworkers Union of Canada, Applicant v. The Corporation of the Town of Innisfil, Responding Party

Certification - Employee - Employee Reference - Board finding secretary/clericals, payroll administrator, municipal law enforcement inspector, property standards officer, and principal planner employed by municipality to be "employees" within meaning of the Act - Records management co-ordinator found not to be an "employee"

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *J. A. Ronson* and *P. V. Grasso*.

APPEARANCES: *J. James Nyman* and *Jim Counahan* for the applicant; *David A. Chondon* and *Richard Groh* for the responding party.

DECISION OF THE BOARD; January 31, 1994

1. By decisions dated October 19, 1993 and October 28, 1993 the Board determined that certain persons employed by the responding party (the "employer") were employees within the meaning of the *Labour Relations Act* (the "Act"). The Board further determined that Linda Sjerps, Records Management Coordinator is not an employee within the meaning of section 1(3) of the Act. The panel was asked to provide its written reasons and we therefore do so now.

2. The employer is the Corporation of the Town of Innisfil (the "municipality" or the "Town"). The applicant (the "trade union") filed an application for certification on March 25, 1993. Following their meeting with a Labour Relations Officer, the employer took the position that ten named individuals were not properly included on the list of employees. It was the position of the employer that Linda Sjerps, Denise Reeves, June Thompson, Tammy Keays, Gwen Gillespie, Helen Parr, Nancy Hill, and Linda Handy, were employed in a confidential capacity in matters relating to labour relations pursuant to section 1(3) of the Act. It was the further position of the employer that Kathleen Brislin and Steve Kinsella exercised managerial functions pursuant to section 1(3) of the Act. It was the position of the applicant that all of the above individuals were properly included on the list of employees and were not excluded by virtue of section 1(3) of the Act.

3. As indicated in the Board's decision of October 19, 1993 a Labour Relations Officer was appointed to inquire into and report to the Board concerning the duties and responsibilities of the ten individuals. Those examinations were held, evidence was taken, transcripts prepared and distributed to the parties, and written submissions were made by each party. A hearing was subsequently convened before this panel which heard the further representations of the parties.

4. The bargaining unit includes what are often referred to as the "inside workers" for the municipality, including for example, clerks, secretaries, receptionist, planners, municipal law enforcement officers, revenue/taxation officers, and building and plumbing inspector, and reflects, in a general way, an office, clerical and technical bargaining unit. At the time the unit was certified, there were thirty-three employees in the bargaining unit, including those challenged by the

employer. The municipality is divided into seven departments, the Clerks, Treasury, Public Works, Fire, Municipal Law Enforcement, Planning, and Parks and Recreation Departments. Twenty-eight “outside” employees are represented by C.U.P.E. and eight full-time firefighters are represented by their Association. There may also be persons employed on a casual basis and the evidence was unclear as to the total payroll for the Town.

5. Six of the ten persons challenged are employed in secretarial, clerical, or receptionist responsibilities for a particular department. June Thompson is employed as Payroll/Payable Administrator (or Assistant to the Administrator - her title was unclear) and Linda Sjerps is employed as Records Management Coordinator. Steve Kinsella is employed as Inspector of Municipal Law Enforcement and Property Standards Officer and Kathleen Brislin is employed as Principal Planner.

6. We propose to first set out the principles that we took into account in reaching our conclusions, and to then review the evidence. With respect to the issue of whether or not Kathleen Brislin and Steve Kinsella exercise managerial functions in accordance with section 1(3) of the Act we accept and adopt the general comments set out in the *Ford Motor Company of Canada Limited decision*, [1993] OLRB Rep. Jan. 1 filed by the employer (see paragraphs 6 - 23). We note that the facts in that case are quite different from those before us.

7. Particularly relevant in this case are the comments cited from the decision in *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121 at paragraphs 3-7, where the Board discusses the factors to be considered and states:

4. ... There is no litmus test which is universally applicable and dictates the result in every situation, and in assessing each case, the Board must have due regard to the *nature of the industry, the nature of the particular business, and individual employer's organizational scheme. There must, of course, be a rational relationship between the number of superiors and subordinates, consultation or "input" should not be confused with decision-making, and neither technical expertise nor the importance of an employee's function can be automatically equated with managerial status.* On the other hand, there may be individuals whose nominal authority appears to be limited, and who have no formal managerial position or title, but who nevertheless make recommendations affecting the economic destiny of their fellow employees which are so frequently forthcoming, and consistently followed by superiors, that it can be said that, in fact, the effective decision is made by the challenged individual. It is this type of recommendation which the Board has characterized as an “effective recommendation” and the inclusion of these persons in the bargaining unit would raise the very kind of conflict of interest which section 1(3)(b) was designed to avoid. Persons making “effective recommendations” of this kind are regarded as part of the “management team”, and are excluded from the bargaining unit.

5. In each instance, the Board seeks to determine the nature and extent of the individual's authority as well as the extent to which that authority is actually exercised. It is not sufficient if an individual has only “paper powers” contained in a job description or a “managerial” job title, if managerial functions are not actually exercised. Even the performance of certain co-ordinating functions may not be determinative. Where numbers of people work at a common enterprise (especially in the white collar - service sector) many persons may be engaged in co-ordinating activities which are largely routine, carried out within a pre-established framework of rules and policies, and subject to real managerial authority which is actually exercised from above. *In addition, persons who perform technical functions or exercise craft skills which have been acquired through years of training and experience, will necessarily have a considerable influence over unskilled employees or less experienced “journeymen” or technicians. These experienced personnel will commonly supervise the work of those who are less experienced, and it is part of their normal job function to train and direct such persons and to instill good work habits.* Often, it is only the most senior or skilled employees who will fully understand the technical requirements of the job and the tools and material required, and accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. *In such circumstances, it is inevitable that they will have a special place*

on the “team” and will have a role to play in co-ordinating and directing the work of other employees; but this does not mean that they exercise managerial functions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining - especially when most of their time is spent performing functions similar to those of other individuals in the bargaining unit and there is little or no evidence of the kind of conflict which section 1(3)(b) is designed to avoid. ...

6. It should always be remembered, however, that the *Labour Relations Act* is intended to extend collective bargaining rights to employees, and it is incumbent upon any party seeking to exclude employees from the scheme of the Act, to come forward with affirmative evidence that they exercise managerial functions. (See: *Ajax and Pickering General Hospital*, [1970] OLRB Rep. Feb. 1283 at paragraph 11; and *Bakery and Confectionery Workers International Union v. Salmi*, 56 DLR (2d) 193). Furthermore, (and in addition to the usual rule that “he who asserts must prove”), a party seeking to alter a *status quo* which has been settled and embodied in a series of collective agreements, must be able to provide a firm evidentiary foundation for its new position. ...

(emphasis added)

8. The comments in paragraph 6 quoted above apply equally to the determination of whether or not someone is employed in a confidential capacity in matters relating to labour relations. In the *Corporation of the Town of Dunnville*, (unreported) dated May 27, 1985 the Board further stated:

5. ... If an individual is not employed in a confidential capacity in matters respecting labour relations, which requires a regular and material involvement with sensitive labour relations information which is confidential because its disclosure would adversely affect the collective bargaining interest of the employer, he will not be excluded under section 1(3)(b), nor can an employer artificially “sprinkle” typing functions among a variety of employees so as to limit the right of those employees to engage in collective bargaining if that is their wish. One must remember that a denial of collective bargaining rights is something the employer must clearly sustain on the evidence...

9. The general approach that the Board takes in cases dealing with whether or not an individual is employed in a confidential capacity in matters relating to labour relations was set out in *Metropolitan Toronto Library Board*, [1991] OLRB Rep. Mar. 339 as follows:

7. The matter in issue between the parties is whether Ms. Fillman is employed in a confidential capacity in matters relating to labour relations. Pursuant to section 1(3)(b) [now section 1(3)] of the *Labour Relations Act*, a person who is so employed is deemed to not be an “employee”. This exclusion enables an employer to better ensure that knowledge of its internal labour relations strategies and communications is restricted to persons whose loyalty is likely to be undivided (*Town of Gananoque*, [1981] OLRB Rep. July 1010, *York University*, [1975] OLRB Dec. 945). A person[s] involvement in such matters must be more than an occasional or incidental one to justify a finding that s/he is not an employee for purposes of the Act (*Frito Lay Canada Limited*, [1978] OLRB Rep. Sept. 831). Access to information which may be sensitive or confidential in some business or general sense is not, by itself, sufficient to cause an individual to be deemed to not be an “employee”. Similarly, access to personnel information is to be distinguished from access to confidential labour relations information. It is the labour relations content or potential for use in the collective bargaining or grievance resolution of information which is important for purposes of the Board’s considerations in an application under section 106(2) of the Act.

10. In that case the Board determined that the individual was not an employee within the meaning of the Act. The employer relies on that decision in this case and on the decision in the *Town of Gananoque*, [1981] OLRB Rep. July 1010 in support of its position that the eight challenged individuals in this case are also so excluded from the list of employees. We find the decision

in the *Town of Gananoque* to be of limited assistance in that the decision does not disclose the broader organizational framework of that employer.

11. In *Airline (Malton) Credit Union Limited*, [1981] OLRB Rep. Nov. 1521 the Board quoted an earlier case:

7. ... *United Community Fund of Greater Toronto*, [1979] OLRB Rep. Dec. 1292, contains a useful review of the purpose and scope of that provision:

"3. The purpose of section 1(3)(b) of the Act is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest, as between their responsibilities and obligations as persons who 'exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations' and their responsibilities and obligations as members of the unit. Collective bargaining, by its very nature, requires an arm's length relationship between the 'two sides' whose interests, objectives and priorities are often divergent. Persons employed in a confidential capacity relating to labour relations are regularly involved with information and matters which, if disclosed, would adversely affect the collective bargaining interests of the employer. Section 1(3)(b) ensures that the employer need not be concerned that such persons will have 'divided loyalties [sic].'

4. Section 1(3)(b) involves three separate criteria: the disputed individual must be employed in a confidential capacity; the material with which that individual works must be confidential; and the material must be related to labour relations. The Board summarized its approach to these criteria in *York University*, [1975] OLRB Rep. Dec. 945 at page 951:

'... the Board must be satisfied of 'a regular, material involvement in matters relating to labour relations' to justify a finding excluding a person from operation of the Act. (See, *The Falconbridge Nickel Mines Ltd.* case, [1969] OLRB Rep. September 379). Mere access to confidential information that may pertain to labour relations, standing alone, is no reason for excluding employees from the bargaining unit. (*The Metropolitan Separate School Board*, case [1974] OLRB Rep. Apr. 220). Nor is mere knowledge of matters that may be deemed 'confidential' in the sense that the employer would not approve of disclosure of such information by his employees sufficient to justify a positive finding under section 1(3)(b). (See *The Comtech Group Limited* case [1974] OLRB Rep. May 291). The important test is whether there is a consistent exposure to confidential information on matters relating to labour relations so as to constitute such exposure an integral part of the employee's service to the employer's enterprise. (See, *Toledo Scale Division of Reliance Electric Limited* case [1974] OLRB Rep. June 406).

5. The handling of collective bargaining information must be at the core of the disputed individual's job functions. An occasional or peripheral involvement is insufficient to justify his exclusion. As the Board observed in *Falconbridge Nickel Mines Ltd.*, [1966] OLRB Rep. Sept. 379:

'A person to be excluded under this provision must be employed 'in a confidential capacity', i.e., such capacity must be part of his regular duties. An accidental or isolated involvement in some aspect of labour relations is not sufficient, in our view, to exclude a person from collective bargaining. However, a regular material involvement in matters relating to labour relations which are confidential because their disclosure would adversely affect the interest of the employer would exclude a person pursuant to the provisions of section 1(3)(b) of the Act. As can be readily seen, the degree of the involvement and the extent of the confidential nature of the matters dealt with become important factors to be considered in determining exclusions under these provisions.

The application of this 'test' of the facts in *Frito-Lay Canada Ltd.*, [1978] OLRB Rep. Sept. 831 prompted the Board to reach the following conclusion:

'While the evidence indicates that the payroll clerks have regular access to a certain amount of confidential information, the Board is not convinced that this type of information is integral to the conduct of collective bargaining by the respondent. These payroll clerks merely collect and collate individual payroll information relating to individual employees. Access to such information does not make them privy to the respondent's industrial strategy, and the Board must conclude that these employees are not employed in confidential capacity in matters relating to labour relations.'

6. It is also necessary that the information with which the disputed employee works is 'confidential' so that its disclosure would undermine the employer's industrial relations position *vis-a-vis* his employee(s). In *Holophane Co. Ltd.*, [1972] OLRB Rep. Dec. 999 the Board found that a switchboard operator, who had access to the absenteeism and disciplinary records of employees was not employed in a 'confidential capacity' because the employees knew, or should have known, the contents of those records. And in *Daal Specialities Ltd.*, [1973] OLRB Rep. Nov. 592, the Board concluded that a switchboard - receptionist who types replies to grievances was not employed in a confidential capacity since these replies were obviously known to trade union officials to whom they were sent and were in no sense 'confidential.'"

(See also *Chelsea Park Nursing Home*, [1978] OLRB Rep. Dec. 1080; *Board of Education for the Borough of Scarborough*, [1980] OLRB Rep. Dec. 1713; *R.C.A. Limited*, [1980] OLRB Rep. Sept. 1316; and *Spruce Falls Power & Paper Co. Ltd.*, [1980] OLRB Rep. Jan. 110).

(emphasis added)

See also *Transair Ltd.*, 74 CLLC 905, at pages 911-912; and *St. Clair College of Applied Arts & Technology*, [1980] OLRB Rep. July 1067 at paragraphs 16-27.

12. We do not intend to review the evidence in the Officer's report in detail. There are details that the parties referred us to that, overall, we were not persuaded were relevant or of assistance, and therefore they may not be referred to. We reviewed the written submissions of the parties. Those written representations were reviewed and supplemented at the hearing.

13. Some general comments may be useful. We are concerned that the parties have engaged in a very expensive and time-consuming process in circumstances where that may have been avoided. The evidence of any exercise of real managerial authority, in light of the individuals' "professional" responsibilities and technical expertise, given the overall size and structure of the employer, is entirely lacking.

14. Similarly, access to confidential information relating to labour relations must be distinguished from access to other information that may well be confidential to the employer but be irrelevant for collective bargaining purposes. The Board has also distinguished between personnel information and information relating to labour relations, particularly where the personnel information is known to the employee or is information that would be required to be disclosed in bargaining. It seems necessary to say that being an employee within the meaning of the Act does not diminish the trust and loyalty of employees in the performance of the work of the employer.

15. In all but one case the overwhelming amount of work done by each person challenged was work that gave rise to no potential for the conflict of interest sought to be avoided by section 1(3). There was no persuasive explanation or evidence for the assertion that discrete secretarial

help was required for each department. In fact each department has that; however the issue is whether each of those persons is so regularly involved in dealing with information of a confidential nature in matters relating to labour relations so as to justify the exclusion of those persons from the Act. In addition, the fact that certain department heads are involved in negotiations with other unionized groups of employees does not inevitably lead to a conclusion that each requires that a clerical person be excluded from their departments.

16. The employer relied on the participation of various individuals in the budget process as evidence of the exercise of managerial authority or access to confidential information. We note that for labour relations purposes, participation in the budget process of a public institution, such as a municipality, may well be of less significance than in a private enterprise, on the basis that the budget, once approved, becomes a public document. In any event, the evidence of participation such as making suggestions, obtaining capital expenditure costs, or tabulating expenditures does not give rise to any potential conflict or mischief under section 1(3). The act of typing a departmental budget submission which includes at most a percentage wage projection, even if arguably providing information that may be relevant to negotiations, but which is subject to further review and change by both the Treasurer and the Town Council, must be balanced against the fact that this activity constitutes a minute portion of the individuals' duties, and therefore argues for an alternate method of preparation so as not to limit the right of employees to engage in collective bargaining (see *Corporation of the Town of Dunnville, supra*).

17. Denise Reeves was involved in the budget process in a way that might give rise to concern, in that she appears to have typed revisions to the overall budget as it is debated in Council. It is not clear whether the Council budget debates are open to the public and therefore much of the information available for public scrutiny in any event. Even assuming not, her responsibilities in connection with the budget, including typing of notes, constitutes only a small portion of her duties. Seventy-five percent of her time is spent as receptionist. She also does accounts receivable, is responsible for postage, files tax certificates, and completes other secretarial work for the Treasury Department. While we agree that it may make some sense to have someone available in the Treasury Department to work on the budget, we were not persuaded that Ms. Reeves' duties as a whole led to the conclusion that she is employed in a confidential capacity in matters relating to labour relations.

18. Our primary conclusion with respect to the eight individuals challenged (on the basis of access to confidential labour relations information) was that, even to the extent that there might be some duties that may give rise to a concern regarding confidentiality with respect to labour relations, seven of the individuals performed them so irregularly or they formed so small a portion of her regular duties, it was not appropriate to conclude that the individual was not an employee on that basis. In light of our general comments and the caselaw cited we will briefly review some of the evidence regarding the six "secretarial" persons (Handy, Keays, Hill, Gillespie, Parr and Reeves), referring to some of the activities that appeared to give rise to concern.

19. The employer relied on evidence that certain individuals had a role in preparing for negotiations. Ms. Handy collated information from payroll records concerning the amount of overtime worked by crews and the amount of lieu time necessary to compensate. We note that this information could be requested by the union in negotiations and is known to the employees. Ms. Keays collected wage information from other fire departments. This information appears to be of public record. Ms. Keays also collected statistics of the number and type of calls received by the fire department, for example, how many were fire-related as opposed to medical emergencies. While this information maybe indirectly be relevant for negotiations, it is primarily information as to the nature of services, the work of the department, and as Ms. Keays testified, is utilized for a

variety of purposes. Ms. Hill has also obtained what would appear to be public information from other municipalities.

20. Ms. Handy recalled once typing some recommendations for proposals for the CUPE negotiations, which it appears were forwarded from the Director of Public Works to the Chief Administrative Officer (the “CAO”). The evidence of the Director regarding Ms. Handy’s duties was of limited assistance in that he referred generally to what Ms. Handy would do and there was little evidence of her having actually performed some of the duties relied on. Minutes of management meetings typed by Ms. Handy concerned business of the department, not matters involving employees or negotiations. By contrast, Ms. Keays has had no involvement in typing proposals for negotiations, although it appears that the Fire Chief is involved in negotiations with the firefighters’ Association. Ms. Reeves was unclear about the nature of contract documents that she had typed, although she understood they concerned unionized staff.

21. A number of these individuals (Ms. Handy, Ms. Hill, Ms. Gillespie, and Ms. Parr) had typed memos recommending merit increases or “band” increases, which recommendation would be subject to approval. In some cases the employee involved would already be advised of the recommendation. Ms. Keays has typed letters advising of the successful completion of exams by firefighters. It is not clear whether they are aware of the results at that point and it is also not clear what effect success or failure in the exam has on the individual’s employment circumstances.

22. Similarly, certain individuals had had occasion to type a disciplinary notice. Ms. Keays has typed disciplinary notices regarding volunteer firefighters (who are excluded from the labour relations process), and which do not therefore reflect on the confidential nature of her duties. She has had no such duties in respect of the full-time employed firefighters. Ms. Hill has typed warning letters to unionized staff after the employee is informed. The other secretary (who is in the bargaining unit) has the same access to that information as she does. Ms. Parr recalls three instances over a period of fifteen years that she has typed a disciplinary notice. She testified there was other discipline in her department in which she had no such involvement.

23. We note that there has been little occasion for the employer to have to resort to disciplinary measures. The employer may argue that although there may be little evidence of the performance of duties in that regard by these individuals, it does not mean that the responsibility does not exist. By the same token, the fact that the responsibility is engaged so infrequently suggests that it cannot be relied on to conclude that these persons are not employees for purposes of the Act.

24. Although different departments appear to keep different types of employee files, the information contained in most is not of a confidential nature within the meaning of section 1(3), although it is information personal to an employee. Other bargaining unit staff often have access to these files. There appear to be other files kept to which access is not available by these individuals. For example, Ms. Keays has certain information about the full-time firefighters, but she has no access to their files kept by the Fire Chief. Ms. Gillespie, Ms. Parr, and it appears, Ms. Reeves, do not have access to “personnel” files. Even the files kept by Ms. Thompson in the Treasury Department appear to contain personal information pertinent only to payroll and benefit coverage.

25. Ms. Thompson and Ms. Sjerps generally perform more accounting and/or clerical functions than the other disputed individuals. Ms. Thompson is responsible for preparing invoices, reports, cheques, the payroll, and processing benefit claims. She receives a copy of discipline imposed after it has issued in order to adjust the payroll. She has locked personnel records in her office, although there was no evidence to suggest that they included any grievance information, rather than simply a notification of discipline. She has access to this personal employee information

in order to properly prepare the payroll. She has been asked to obtain benefit cost information for purposes of negotiations, although the Deputy Treasurer has also obtained this type of information.

26. By contrast, Ms. Sjerps has access to, and is responsible for all the files of the Town, wherever situate, including files coded as H007, labour relations. We concluded that Linda Sjerps, Records Management Coordinator, is not an employee for purposes of the Act in that she regularly deals with and is responsible for the Town's record management system, including information that is confidential in respect of labour relations. In addition, she performs clerical work and has been and is available to the employer to perform clerical work that is of a confidential nature in matters relating to labour relations. She has typed budget and contract proposals and has filled in for other secretaries who are excluded from the bargaining unit. This includes the secretary to the CAO and the secretary to the Mayor. All these individuals are situate in the CAO Office and Clerks Department.

27. Steven Kinsella prosecutes municipal by-law infractions in the Provincial Court in Barrie and administers parking infraction notices and conducts traffic studies regarding speed signs and their locations. In the last couple of years the Town has taken over the prosecution of parking infractions from the police and as a consequence the workload has gone up considerably. He also receives any drainage complaints with respect to Town by-laws. Mr. Kinsella reports to the Director of Municipal Law Enforcement. In that department there are also three municipal law officers and two secretaries (one of whom was also challenged in these proceedings). Mr. Kinsella spends all of his time performing these functions for the Town. None of the other employees in the department report to him although he is consulted with respect to law enforcement matters. He has considerable expertise and skill in this area arising from education, training and prior experience.

28. Mr. Kinsella is to fill in for the Director when absent, although the evidence did not indicate whether he had ever in fact done so. At most it would appear that Mr. Kinsella would fill in if the Director were absent on vacation or due to illness for short periods. If the officers have questions after hours, they attempt to contact the Director first, failing which, they would attempt to contact Mr. Kinsella.

29. Mr. Kinsella is in a higher rated classification than the officers. He is paid a salary. He is required to be on call seven days a week. He requires authorization in order to work overtime or to take time off. He receives compensation for overtime in the form of time off. He has the use of a municipal vehicle.

30. He had conducted one or two performance appraisals prior to 1991 but was then told evaluations were to be done by the Director. That occurred in circumstances where he had not recommended an increase as high as was ultimately given to the employee. Mr. Kinsella's involvement in the budget is simply obtaining information regarding capital costs. While the employer relied on Mr. Kinsella's conduct concerning the reporting of improper conduct on the part of other employees in the department, his actions in those situations do not amount to the exercise of managerial authority. In one instance he advised the Director that an employee was breaching policy by collecting cheques instead of delivering summonses. The Director asked him to speak to the employee. He did. She was not aware of the policy. No discipline issued. In another example, Mr. Kinsella suggested that an employee be suspended because in his view the employee was neglecting his duties. No action was taken against the employee. Finally, Mr. Kinsella offered his opinion with respect to the performance of a temporary employee.

31. The employer also relied on Mr. Kinsella's involvement in the hiring process. Mr. Kinsella sat in on two interviews at the request of the Director and offered his views as to whether or not he felt the candidate was qualified. In both cases the job was that of Municipal Law Enforcement Officer. While the employer asserted that Mr. Kinsella made an effective recommendation to the Director, on the evidence, it would appear more accurate to state that the Director made an effective recommendation to Town Council which is responsible for hiring. In one case the Director had no reservations about the candidate. In the other he sought Mr. Kinsella's view as to whether the individual was able to "handle" the job. This individual had been employed as a secretary by the Town and it would seem both individuals knew her work in that regard. A temporary employee was hired without any input from Mr. Kinsella.

32. While there is little doubt that Mr. Kinsella has more extensive experience and perhaps training, and a broader range of job duties than do the Municipal Law Officers, that does not lead to the conclusion that he exercises managerial authority with respect to their employment. The fact that he may have sat in on interviews and offered his views as to the qualifications of the candidates is insufficient to bring his functions within the ambit of section 1(3). Similarly the fact that he raises mistakes in performance with the employees or with the Director, in the absence of evidence of some greater involvement in a disciplinary process, only suggests that he is conscientious with respect to the performance of the work in his department. To the extent that he has on occasion offered his opinion as to an appropriate consequence, it appears his suggestions have not been followed. We concluded therefore that Mr. Kinsella did not exercise managerial authority pursuant to section 1(3) of the Act, and that he was therefore an employee for purposes of the Act.

33. Our general comments with respect to the duties and responsibilities of Kathleen Brislin echo those made in respect of Mr. Kinsella. As Principal Planner, Ms. Brislin is primarily responsible for longer term planning policy and development, including reviewing official plan amendments and other land use planning matters. The Planning Department is headed by a Director and divided into the planning division and building division. The planning division includes two additional planners whose responsibilities are primarily more immediate implementation of planning policy, and two secretaries (one of whom is challenged in these proceedings). Ms. Brislin fills in for the Director when he is absent. The evidence disclosed one occasion where, in the absence of the Director, Ms. Brislin authorized certain time off for an employee. In any event, and similar to Mr. Kinsella, the fact that a departmental member may fill in for the Director for vacation or sick leave is insufficient to conclude that that person exercises managerial authority as a regular part of their functions. Mr. Brislin attends in-camera Town Council meetings with the Director. However these involve planning matters and not personnel or collective bargaining matters. Other planners also have attended in-camera meetings. Her involvement in the budget is simply to provide suggestions to the Director, as do other planners.

34. Ms. Brislin did sit on interviews with respect to the hiring of a planner approximately one and a half years ago. She participated in those interviews and offered her views on the candidates. We note there was no dispute or question between the Director and Ms. Brislin as to the appropriate candidate to recommend to Council for hire.

35. The employer also relied on one occasion where Ms. Brislin spoke to the secretary who completes work for the Director and Ms. Brislin. Both had concerns over the employee's productivity. Ms. Brislin asked the employee if they could both work to be more productive and the problem apparently improved. Ms. Brislin did not view this as disciplinary action. According to the Town's employee by-law this would not be viewed as disciplinary action in that it was not followed up in writing. The fact that Ms. Brislin generates work for the secretary to complete and is there-

fore in a position to assess the secretary's performance, is an insufficient basis from which to conclude she exercises managerial functions.

36. Overall, the fact that Ms. Brislin sat in on interviews with respect to the hire of one employee was insufficient in our view, in light of her other responsibilities, to conclude that she exercises managerial functions such that she is excluded from the operation of the Act.

37. It may be that as a result of this decision the employer will be required to reassess the assignment of certain duties and responsibilities and review and identify those areas where it has legitimate concerns regarding the mischief to which section 1(3) is addressed. In cases like this, decisions of the Board inevitably influence the organizational structure of the employer. The evidence reflected at best the irregular and limited performance of duties and responsibilities that might give rise to concern that there existed potential for the conflict of interest sought to be avoided by section 1(3). That is insufficient to warrant a finding that persons are not employees for purposes of the Act. Therefore, our decision as set out in paragraph 1 herein issued.

2618-93-R; 2619-93-R Ontario Public Service Employees Union, Applicant v. The Governing Council of the Salvation Army in Canada and Bermuda, Responding Party

Bargaining Unit - Certification - Combination of Bargaining Units - Union already representing certain employees of employer - Union applying for certification in respect of tag-end municipal unit - Employer urging Board to create four separate bargaining units designated by street address and function - Employer submitting that part of employer's organization might be found to be "hospital" within meaning of *Hospital Labour Disputes Arbitration Act (HLDAA)* - Board finding HLDAA concern to be speculative and not persuaded that employees covered by HLDAA must be included in separate unit - Board observing that more comprehensive unit usually appropriate unless serious labour relations problems demonstrably overwhelm difficulties associated with fragmentation or unless larger unit is idiosyncratic or perverse - Board noting that more comprehensive unit presumptively appropriate, if that is what union has organized and applied for - Union's proposed unit found to be appropriate - Certificate issuing - On agreement of parties, Board directing that newly-certified bargaining unit should be combined with unit already represented by union

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *W. A. Correll* and *E. G. Theobald*.

APPEARANCES: *Chris Dassios, A. Lokan, E. Ogibowski* and *Kim Simcoe* for the applicant; *David Cowling, Capt. M. Fisher, Capt. Larry Jones, Capt. Carson Durdle, Capt. Karyn Kerr* and *Reginald Rambarran* for the responding party.

DECISION OF THE BOARD; January 5, 1994

I

1. The Board was advised that the proper name of the respondent employer is "The Governing Council of the Salvation Army in Canada and Bermuda". That is the correct designation for the legal entity which undertakes the social and community programs in which the employees

affected by this application are employed. Accordingly, the name of the respondent is hereby amended to read: "The Governing Council of the Salvation Army in Canada and Bermuda".

2. For ease of reference, though, we may sometimes refer to the respondent simply as "The Salvation Army" or "the employer".

II

3. This is an application for certification which was filed together with a related application to combine bargaining units. The provisions of the Act to which reference will be made are as follows:

5.- (1) Where no trade union has been certified as bargaining agent of the employees of an employer in a unit that a trade union claims to be appropriate for collective bargaining and the employees in the unit are not bound by a collective agreement, a trade union may, subject to section 62, apply at any time to the Board for certification as bargaining agent of the employees in the unit.

* * *

6.- (1) Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

* * *

7.-(1) On application by the employer or trade union, the Board may combine two or more bargaining units consisting of employees of an employer into a single bargaining unit if the employees in each of the bargaining units are represented by the same trade union.

(2) On an application under subsection (1) that is considered together with an application for certification, the Board may do the following:

1. Combine the bargaining unit to which the certification application relates with one or more existing bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units.
2. Combine the bargaining unit to which the certification application relates with other proposed bargaining units if the certification application is made by the trade union applying for certification for the other proposed bargaining units.
3. Combine the bargaining unit to which the certification application relates with both existing and proposed bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units and that has applied for certification for the other proposed bargaining units.

(3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,

- (a) would facilitate viable and stable collective bargaining;
- (b) would reduce fragmentation of bargaining units; or
- (c) would cause serious labour relations problems.

(4) In the case of manufacturing operations, the Board shall not combine bargaining units of employees at two or more geographically separate places of operations if the Board considers that a combined bargaining unit is inappropriate because the employer has established that combining the units will interfere unduly with,

- (a) the employer's ability to continue significantly different methods of operation or production at each of those places; or
- (b) the employer's ability to continue to operate those places as viable and independent businesses.

(5) In combining bargaining units, the Board may amend any certificate or any provision of a collective agreement and may make such other orders as it considers appropriate in the circumstances.

(6) This section does not apply with respect to bargaining units in the construction industry.

4. In the certification application, the union seeks to establish its right to represent a group of the respondent's employees who are currently unrepresented. The union claims that the majority of these employees support certification, and that it may therefore be certified to represent them. Once certified (or certifiable), however, the union seeks a further direction under section 7 of the Act, to combine the newly-organized group, with a group of employees whom it already represents.

5. The union already represents a full-time employee bargaining unit which is described in the parties' collective agreement as follows:

ARTICLE 2 - RECOGNITION

2.01 The Employer recognizes the Union as the sole bargaining agent of all employees of The Salvation Army Booth Industries employed in the Municipality of Metropolitan Toronto, save and except head of counselling, senior work supervisor, persons above the rank of head of counselling and senior work supervisor, secretary to the Administrator, bookkeeper, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

2.02 "Employee" as used in this Collective Agreement shall mean those persons described in the bargaining unit set forth in Clause 2.01.

6. The union's objective is to create one large bargaining unit encompassing all of the employees of the respondent that the union represents.

7. These related applications came on before the Board, together, on November 29, 1993. The Board first dealt with, and granted, the certification application. Our reasons for that determination will be set out below.

8. Following the Board's oral ruling on the certification application, the parties advised that they were agreed upon an order combining the two bargaining units (i.e., the newly-certified group and the group already represented), but requested that the Board remain seized in the event that there was any difficulty.

III

The Certification Application

9. There is no dispute that the application for certification was timely - that is, that the employees to which it relates were currently unrepresented.

10. There is no dispute that the applicant is a “trade union” within the meaning of the Act.
11. However, the parties do not agree on the description of the unit of employees appropriate for collective bargaining.
12. The number of unrepresented employees affected by this certification application is less than two dozen. The union seeks a single bargaining unit, encompassing all of these unrepresented employees, regardless of the street address at which they work, and even though they provide somewhat different social and counselling services. The union describes this as a “tag-end unit”, in the sense that it would take in all employees in the Community Mental Health Services program employed in Metro Toronto, with some exceptions not here relevant.
13. The employer urged the Board to create four separate bargaining units designated by street address and function, each of which would cover a handful of employees.
14. The union pointed out that the paycheques are signed by the Executive Director of the program who plays an active and pivotal role in decision-making, regardless of location. In the union’s submission, the Executive Director was, and would continue to be, directly involved in any labour relations question of any importance; moreover, most of the employees are “counsellors” of one kind or another, engaged in social service functions which were not distinguishable for collective bargaining purposes.
15. The employer maintained that the locations were run separately, that they provided somewhat different social services, that they had different revenue sources (i.e., government agency grants), that there was little interchange of employees, that each location had a separate pay equity plan (we do not know why), and that one location might be considered to be a “hospital” under the *Hospital Labour Disputes Arbitration Act* (“HLDAA”) (it has not, in fact, been so declared). Counsel for the employer pointed out that the “Booth Industries unit” currently represented by the union, was certified as a separate group about a dozen years ago.

* * *

16. After considering the parties’ representations, the Board ruled that the more comprehensive bargaining unit sought by the union was appropriate for collective bargaining. We were not persuaded that there would be any serious labour relations problems arising from a unit encompassing this broader employee grouping. Indeed, the more comprehensive unit avoids the difficulties inherent fragmenting the bargaining structure - a problem addressed by recent changes to the Act governing the structure of bargaining units on certification, and permitting the combination of bargaining units to reduce their number.
17. In the Board’s view, it made no collective bargaining or labour relations sense to sub-divide the employer’s social service program into little islands of separate collective bargaining, each of which might have its own collective agreement, its own separate seniority system, its own access to first contract arbitration, its own strike, and so on; and of course, each of which could conceivably be represented by a separate trade union. In the Board’s view, this kind of patchwork quilt of collective bargaining units was undesirable, and could be avoided by the more comprehensive grouping sought by the union. It made little sense to create fragmentation on the “front end” certification, then put the fragments together again, later, under section 7 of the Act.

IV

18. Several years ago, in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, the

Board undertook a review of its traditional approach to bargaining unit determination. The Board noted at paragraph 14:

14. It will be seen that the statutory language has remained basically unchanged for more than four decades, and in the early years it provided the basis for making broad distinctions for bargaining unit purposes between such groups as: “white collar” office and technical employees, and “blue collar” production employees; skilled tradesmen (electricians, plumbers, sheet metal workers, etc.), and unskilled or semi-skilled workers; part-time employees and full-time employees; employees working for an employer in one plant or municipality and employees in another plant or municipality; and so on. However, these fairly simple, and then unexceptional distinctions, do not apply so easily today. Collective bargaining has extended beyond its traditional “blue collar” industrial base, into the public sector and to increasingly sophisticated and diverse job hierarchies. Real life collective bargaining experience has outstripped some of the conventional wisdom and has shown that the collective bargaining system can exhibit quite a variety of structures, which, at one time, parties might have considered unconventional or inappropriate. Ontario Hydro, for example, has a province-wide bargaining unit, encompassing a broad range of employee classifications, and thousands of employees, ranging from unskilled workers to highly trained technicians. A typical municipal “inside workers” (white collar) bargaining unit may include occupations ranging from filing clerks, to computer programmers, economists and planners with a considerable amount of post-secondary or even graduate training [see the Board’s decision in *The Regional Municipality of Durham*, Board File 1818-84-R, decision released November 20, 1984]. The Ontario Civil Service bargaining unit contains thousands of employees ranging from clerks and typists to sophisticated scientific and technical personnel - and, incidentally, the staff of a number of provincial psychiatric hospitals (see: *Owen Sound General and Marine Hospital*, [1978] OLRB Rep. May 445, where the Board noted that in the government sector nurses, paramedicals, service employees, and clericals are all in the same unit, even though under the *Labour Relations Act*, they have typically been segregated into separate units). While at one time common opinion and industrial relations practice might have supported fairly rigid (almost “class”) divisions between employee groups, modern collective bargaining seems to be able to thrive quite well in many contexts without such rigid distinctions. It is no longer as easy as it once was to say that it is “inappropriate” to group together for collective bargaining purposes, employees with quite diverse skills, education, training, position in the job hierarchy or probable aspirations.

The Board signalled its intention to be more flexible and forensic about bargaining unit structure, then went on to say:

... We are troubled by the fact that a largely administrative and policy-laden determination has mushroomed in some cases into an elaborate, expensive, and time-consuming process for deciding a relatively simple question: does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

[emphasis added]

If the unit applied for meets that simple test, it serves no purpose to litigate or consider alternative bargaining unit configurations.

19. Both in *Hospital for Sick Children* and in later cases, the Board has explored the tension between bargaining structures that facilitate organizing (one of the goals of the Statute), and bargaining structures that are likely to be more stable and effective in the long-run (another goal of the Act). The former objective points to smaller employee groupings which are more readily organized. The latter goal points to broader-based bargaining units that have the organizational mass and bargaining power to survive over time and in changing market conditions.

20. These goals must be harmonized within a framework that now recognizes that there is no single unique and indisputably “appropriate” unit. There are degrees of appropriateness; or to put the matter another way, sensible, alternative ways in which one can define the bargaining unit

without triggering (as the Board in *Hospital for Sick Children* put it) “serious labour relations problems”. A trade union need not seek to represent the *most* comprehensive or *most appropriate* bargaining unit; and as the applicant or moving party, the union has a degree of flexibility in deciding what unit to organize. As long as the unit it seeks does not generate serious labour relations difficulties for the employer, it will be granted the unit it applies for.

21. If there is one theme that has been constant in the Board’s concerns, both before and after *Hospital for Sick Children*, it is the aversion to fragmentation: the sub-division of an employer’s enterprise into a number of separate collective bargaining components - which become separate seniority districts, which can lead to jurisdiction or inter-employee rivalries, which can generate organizational problems if one or other fragment goes on strike, which can make work-sharing or technological change more difficult to accommodate, and so on. Accordingly, while smaller subdivisions may be appropriate in the context of a particular case, and may be necessary to facilitate organizing (despite the collective bargaining “downside” described above), a broader, more comprehensive unit will *also* generally be appropriate. In other words, if a trade union seeks a *more* comprehensive bargaining unit, this larger unit will usually be appropriate, and will very likely be accepted on the *Hospital for Sick Children* test, unless there are serious labour relations problems with it which *demonstrably* overwhelm the difficulties associated with fragmentation, or unless the larger unit applied for seems idiosyncratic or perverse. Indeed, unless the labour relations context is quite unusual, one would expect the more comprehensive bargaining unit to be presumptively appropriate, if that is what the union has organized and applied for; and it serves no purpose to engage in the exercise mentioned in the emphasized portion of the *Hospital for Sick Children* case reproduced at paragraph 18.

22. In the instant case, we see no reason to reject the union’s proposed unit, even though some dozen years ago, the smaller, Booth Industries grouping, was found to be appropriate in the setting of the time. The Board’s approach has evolved since then, and so has the Statute which now “tilts” in favour of broader units if other statutory goals can be met as well (and now provides the means to combine bargaining units once found to be appropriate, applying the approach described above).

23. The only troublesome aspect of the instant case is the plea that a part of the employer’s organization *might* be found to be a “hospital” - as we understand it, because there is a consulting psychiatrist (not an employee) and the service of counsellors is directed to the clients’ mental health.

24. However, as we understand it, there are no nurses involved, nor is it evident that the service involves the kind of medical care associated with what one usually considers to be a hospital. But the concern is, at present, entirely speculative, and even if one location were found to be a “hospital” within the meaning of the *HLDA*, it is not at all clear that the situation would be so legally or functionally different in this fragment of the employer’s organization that it demands a separate bargaining unit. Municipalities provide a variety of counselling services, and large ones, like the Municipality of Metropolitan Toronto, have within their ranks, and within the same bargaining grouping, employees covered by the *HLDA*, and employees (the majority) who are not. We are not aware of any concrete collective bargaining problems arising from this mixing of employees - although, of course, the *HLDA* “employees” may not have the right to strike.

25. For all of these reasons, the Board finds that the unit of employees appropriate for collective bargaining may be described as follows:

all employees of The Governing Council of the Salvation Army in Canada and Bermuda employed by Salvation Army Mental Health Services in the Municipality of Metropolitan

Toronto, save and except head of counselling, senior work supervisor, persons above the rank of head of counselling or senior work supervisor, secretary to the Administrator at Booth Industries, bookkeeper, students on placement, and persons for whom any trade union held bargaining rights as of October 19, 1993.

Clarity Note

For the purpose of clarity, the Board notes that Viola Brown, Secretary to the Administrator, and Gail McKnight, are excluded from the above-described unit because they exercise functions to which section 1(3) of the Act relates.

26. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on October 19, 1993, the certification application date, had applied to become members of the applicant on or before that date.

27. A certificate will issue to the applicant with respect to the bargaining unit described in paragraph 25 above.

V

28. As we have already noted, the parties have agreed that the newly-certified bargaining unit defined in paragraph 25 should be combined with the unit that the union already represents, defined in paragraph 5. It is so ordered.

29. We were told that the parties have a good collective bargaining relationship and that they should have no difficulty working out a collective agreement to cover the amalgamated employee grouping. Nevertheless, in accordance with the parties' agreement, we will remain seized in the event that there are any difficulties in this regard.

3410-92-R United Steelworkers of America, Applicant v. Wackenhut of Canada Limited, Responding Party

Bargaining Unit - Certification - Employee - Security Guards - Board determining that "site supervisors" employed by security firm not exercising managerial functions within meaning of section 1(3) of the Act - "Site supervisors" included in bargaining unit - Final certificate issuing

BEFORE: *Janice Johnston*, Vice-Chair, and Board Members *W. H. Wightman* and *E. G. Theobald*.

DECISION OF THE BOARD; January 6, 1994

1. This is an application for certification. The Board by decision dated April 27, 1993 [now reported at [1993] OLRB Rep. Apr. 393] certified the union on an interim basis and appointed a Labour Relations Officer to inquire into and report to the Board on the duties and responsibilities of seven persons, two of whom are classified as patrol supervisors and five of whom are classified as site supervisors.

2. During the examination, the parties agreed on the following:

- (a) that the Board should determine the question of all excluded persons classified as site supervisor based on the evidence of Mr. Cecil McClory;
- (b) that Robert Hertzberger and Lyle Ruby are classified as associate patrol supervisors and are included in the bargaining unit;
- (c) that the position of patrol supervisor is above the rank of site supervisor.

3. It is the position of the applicant, the United Steelworkers of America (the "union"), that the five individuals classified as site supervisor should be included in the bargaining unit. The responding party, Wackenhut of Canada Limited (the "employer" or "Wackenhut") asserts that the five individuals exercise managerial functions within the meaning of section 1(3) of the *Labour Relations Act* (the "Act") and should therefore be excluded from the bargaining unit.

4. The Board Officer conducted the usual examinations at which time the parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issue. A copy of the Board Officer's Report (the "Report") dated July 5, 1993 was sent to each of the parties together with a Form B35 (Notice of Report of Labour Relations Officer). This notice extends to the parties the opportunity to make representations as to the accuracy of the Report or the conclusions that, in their submission, the Board should reach in view of its contents. Both parties availed themselves of the opportunity to make written submissions.

5. The relevant section of the Act is section 1(3) which provides as follows:

1.- (3) For the purposes of this Act, no person shall be deemed to be an employee who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

6. The Act does not define the term "managerial functions" as used in section 1(3) of the Act. The meaning of that term is therefore to be found in the Board's extensive jurisprudence on this point. The Board has developed criteria, guidelines and tests to be applied in determinations as to whether or not an individual exercises managerial functions and is thereby found not to be a "employee" within the meaning of the Act. The jurisprudence was summarized in *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121 and it explains the rationale for section 1(3) as follows:

...

2. Section 1(3)(b) excludes from collective bargaining persons who in the opinion of the Board exercise managerial functions. The purpose of the section is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or employees in the bargaining unit. Collective bargaining, by its very nature, requires an arm's length relationship between the "two sides" whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade union, nor that its members will have "divided loyalties". This purpose has been succinctly stated by the British Columbia Labour Relations Board in *Corporation of the District of Burnaby* [1974] CLRB Rep. at page 3:

The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at

the top have the authority to direct the efforts of those nearer the bottom. To achieve counter-vailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management - on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.

The rationale for that decision is obvious as far as the employer is concerned. It wants to have the undivided loyalty of its senior people who are responsible for seeing that the work gets done and the terms of the collective agreement are adhered to. Their decisions can have important effects on the economic lives of employees, e.g., individuals who may be disciplined for "cause" or passed over for promotion on the grounds of their "ability". The employer does not want management' identification in the activities of the employees union.

More subtly, but equally as important, the exclusion of management from bargaining units is designed for the protection of employee organizations as well. An historic and still current problem in securing effective representation for employees in the face of employer power is the effort of some employers to sponsor and dominate weak and dependent unions. The logical agent for the effort is management personnel. One way this happens is if members of management use their authority in the work place to interfere with the choice of a representative by their employees. However, the same result could happen quite innocently. A great many members of management are promoted from the ranks of employees. Those with the talents and seniority for that promotion are also the very people who will likely rise in union ranks as well. In the absence of legal controls, the leadership of a union could all be drawn from the senior management with whom they are supposed to be bargaining. If an arm's length relationship between employer and union is to be preserved for the benefit of employees, the law has directed that a person must leave the bargaining unit when is is promoted to a position where he exercises management functions over it.

3. *The Labour Relations Act* does not contain a definition of the term "managerial function", nor are there any specified criteria to guide the Board in reaching its opinion. The task of developing such criteria has fallen to the Board itself, and in recognition of the fact that the exercise of managerial functions can assume different forms in different work settings, the Board has, over the years, evolved various general approaches to assist it in its inquiry. In the case of so called "first line" managerial employees, the important question is the extent to which they make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them. Thus, the right to hire, fire promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit. In the case of more senior managerial personnel whose decision-making may have a less direct or immediate impact on bargaining unit employees, the Board has focused on the degree of independent decision-making authority over important aspects of the employer's business. It is evident that persons making significant executive or business decisions should be considered a part of the "management team" even though they do not exercise the kind of direct authority over employees which is characteristic of a first line foreman.

4. The line between "employee" and "management" is often shaded, and while it is helpful to consider the principles articulated by the Board in previous cases, ultimately the determination must turn on the facts of the particular case. There is no litmus test which is universally applicable and dictates the result in every situation, and in assessing each case, the Board must have due regard to the nature of the industry, the nature of the particular business, and individual employer's organizational scheme. There must, of course, be a rational relationship between the number of superiors and subordinates, consultation or "input" should not be confused with decision-making, and neither technical expertise nor the importance of an employee's function can be automatically equated with managerial status. On the other hand, there may be individu-

als whose nominal authority appears to be limited, and who have no formal managerial position or title, but who nevertheless make recommendations affecting the economic destiny of their fellow employees which are so frequently forthcoming, and consistently followed by superiors, that it can be said that, in fact the effective decision is made by the challenged individual. It is this type of recommendation which the Board has characterized as an "effective recommendation" and the inclusion of these persons in the bargaining unit would raise the very kind of conflict of interest which section 1(3)(b) was designed to avoid. Persons making "effective recommendations" of this kind are regarded as part of the "management team", and are excluded from the bargaining unit.

5. In each instance, the Board seeks to determine the nature and extent of the individual's authority as well as the extent to which that authority is actually exercised. It is not sufficient if an individual has only "paper powers" contained in a job description or a "managerial" job title, if managerial functions are not actually exercised. Even the performance of certain co-ordinating functions may not be determinative. Where numbers of people work at a common enterprise (especially in the white collar - service sector) many persons may be engaged in co-ordinating activities which are largely routine, carried out within a pre-established framework of rules and policies, and subject to real managerial authority which is actually exercised from above. In addition, persons who perform technical functions or exercise craft skills which have been acquired through years of training and experience, will necessarily have a considerable influence over unskilled employees or less experienced "journeymen" or technicians. These experienced personnel will commonly supervise the work of those who are less experienced, and it is part of their normal job function to train and direct such persons and to install good work habits. Often, it is only the most senior or skilled employees who will fully understand the technical requirements of the job and the tools and material required, and accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. In such circumstances, it is inevitable that they will have a special place on the "team" and will have a role to play in co-ordinating and directing the work of other employees; but this does not mean that they exercise managerial functions in the sense contemplated by the section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining - especially when most of their time is spent performing functions similar to those of other individuals in the bargaining unit and there is little or no evidence of the kind of conflict which section 1(3)(b) is designed to avoid. The situation of persons who exercise some degree of control over others, but who also perform bargaining unit work was discussed by the Board in *Falconbridge Nickel Mines Limited*, [1966] OLRB Rep. Sept. 379, as follows:

Most of the persons in dispute have more than one function and generally speaking it is the weight or emphasis attached to the different functions which must determine on which side of the managerial line the persons fall. Senior or skilled employees often have more responsibilities than other rank and file employees and they exercise certain control and direction over the other employees because of their greater experience and skill. It is the Board's difficult task to determine whether the additional responsibilities are managerial functions within the meaning of section 1(3)(b) of the Act or are merely incidental to the prime purpose for which the employee is engaged (i.e., to perform work properly performed by persons within the bargaining unit). If the majority of a person's time is occupied by work similar to that performed by employees within the bargaining unit and such person has no effective control or authority over the employees in the bargaining unit but is merely a conduit carrying orders or instructions from management to the employees, the person cannot be said to exercise managerial functions within the meaning of section 1(3)(b) of the Act. On the other hand, if a person is primarily engaged in supervision and direction of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank and file employees when an emergency arises or to relieve an employee during occasional periods of absence or even to perform a particularly important job requiring special skill and experience, such occasional work in no way derogates from his prime function as a person employed in a managerial capacity. When assessing a person's duties and responsibilities the Board does not look at any one function in isolation but views all functions in their entirety. As stated in the *McDougall Case* above referred to, titles alone are not much assistance in determining what person's functions really are...

The cases cited above would seem to indicate that while a person may have minor supervisory function or very limited confidential function in matters relating to labour relations, if such func-

tions are merely incidental to their main function and are of such a nature that they cannot be said to materially effect the employment relationship of the respondent's employees, such persons should be excluded from collective bargaining reason or section 1(3)(b) of the Act. Unless a person who regularly performs work similar to persons in a bargaining unit has independent discretionary powers rather than merely incidental reporting functions which are subject to the discretion and authority of higher persons in management, there is no reason to exclude such a person from collective bargaining.

In other words, in determining an individual's status, one cannot look at a portion of his duties in isolation. If the functions of an allegedly "managerial" character occupy only a minor part of his time, it is unlikely that he will be excluded from the ambit of collective bargaining unless those functions involve a decisive impact on his fellow employees. (For example, a unilateral decision to fire an employee would be highly significant, even if the exercise of such power is infrequent; while incidental supervisory responsibilities do not raise the kind of conflict of interest underlying section 1(3)(b).

...

7. Having regard to the provisions of the Act, the principles set forth in the Board's jurisprudence and having considered the Board Officer's Report and the representations received by the Board, we conclude that Mr. James Brady, Mr. Cecil McClory, Mr. Glen Parrest, Mr. Thomas Riggs and Mr. Ronald Sanvido are employees under the Act and do not exercise managerial functions within the meaning of section 1(3) of the Act.

8. Wackenhut maintains contracts for the provision of security services for a range of clients in the Kitchener-Waterloo area. Mr. Cecil McClory is a site supervisor for one of Wackenhut's clients, the Campbell Soup Company plant in Listowel. There are four Wackenhut employees at this site. In addition to Mr. McClory there is one other full-time employee and two part-time employees all of whom are classified as security officers. Mr. McClory reports to an individual or individuals at the employer's head office in Kitchener. No title for the position to whom he reports was provided.

9. The vast majority of of Mr. McClory's time is spent performing the same duties as those of the other security guards. He sits in a guard house at the gate to the plant and watches truck traffic and visitors entering and exiting the plant, and signs in trucks and visitors. He also does rounds within the offices and plant. Other than at shift change or in exceptional circumstances, Mr. McClory's hours of work do not overlap with those of the other security guards. The full-time guard and Mr. McClory primarily work Monday to Friday and the two part-time guards primarily work on the weekends.

10. Although Mr. McClory is responsible for scheduling the work of the other security guards, the schedule is not a complex one and is generally made up a year in advance. Security guards who want a particular shift off make the arrangements to trade shifts and then inform Mr. McClory. Although Mr. McClory reports, on a weekly basis, the hours worked by the employees at the site, if there is a problem with an employee's paycheque that employee would take the problem up with the Kitchener office not Mr. McClory.

11. Mr. McClory does not have independent decision-making authority with regard to the discipline or the discharge of the security guards working at his site. It is very clear that if an incident occurs, Mr. McClory reports it to the Kitchener office and receives direction from someone there. Although he might suggest a course of action to the Kitchener office, this suggestion is merely input which is considered in reaching a decision. Mr. McClory is not the effective decision-maker, he is merely the conduit who brings matters to the attention of management and then implements the decision they have made.

12. Although he may occasionally play a minor role in the hiring process, Mr. McClory does not have the authority to hire individuals. He does not have the authority to grant wage increases or to promote individuals. There is no formal system of performance evaluation. Although Mr. McClory is involved in the orientation of new employees, there is nothing to suggest that his role is any different in this regard than the other experienced security guards. Although he receives a premium of about forty-one cents per hour, Mr. McClory is paid hourly as are the other security guards. Mr. McClory does not receive any fringe benefits different than those of the other security guards.

13. Mr. McClory is responsible for contact with and liaising with the client, Campbell Soup Company, on the site. While this is no doubt an important function, it is not a managerial function. As the Board's jurisprudence indicates, it is not the individual's title or what the employer puts in a job description that is decisive in an inquiry as to whether an employee should or should not be a member of the bargaining unit. An individual will only be found not to be an employee for the purposes of the Act if he or she in fact performs duties which are managerial in their nature. It is clear to us that Mr. McClory does not perform managerial functions such as would result in the exclusion of the site supervisors from the bargaining unit. It is obvious that Mr. McClory functions as a "lead hand" or "team leader". Along with the other guards, he coaches and orients new staff, ensures the work shifts are covered and co-ordinates the exchange of shifts. He primarily performs the job duties of a security officer. His supervisory functions are extremely minimal and do not put him in a conflict of interest with his fellow employees. Accordingly, we conclude that the site supervisors do not exercise managerial functions and are to be included in the bargaining unit.

14. As a result of this conclusion and the partial agreement of the parties we find that the following constitutes a unit of employees appropriate for collective bargaining:

all security guards of Wackenhut of Canada Limited in the City of Kitchener, the City of Waterloo, the City of Cambridge, the Town of Listowel and the City of Guelph, save and except patrol supervisors, persons above the rank of patrol supervisor, dispatchers, and office, clerical and sales staff.

Clarity Note: The parties hereby agree that Robert Hertzberger and Lyle Ruby are classified as associate patrol supervisor and are included in the bargaining unit.

15. A final certificate will now issue to the applicant for the above noted bargaining unit.

**2712-90-M; 0791-91-M; 0602-92-M York University Staff Association, Applicant
v. York University, Responding Party**

Employee - Employee Reference - Board finding Assistant Director of Athletics, Advertising and Publication Officer, Funding-raising Managers, Financial Aid Administrator, Project Coordinator and Construction Engineer employed by university to be "employees" within meaning of the Act - Leisure Services Officer, Co-ordinator of Policy and Research, Administrative and Production Supervisor, Fine Arts Liaison Officer, Administrative Officer, Convocation Officer, Assistant Director of Secondary School Liaison, and Manager of Administrative Computing found not to be "employees"

BEFORE: *M. Kaye Joachim*, Vice-Chair, and Board Members *R. M. Sloan* and *H. Peacock*.

DECISION OF M. KAYE JOACHIM, VICE-CHAIR AND BOARD MEMBER H. PEACOCK;
January 28, 1994

1. The applicant made three applications under section 106(2) (now section 108(2)) of the *Labour Relations Act*, for a determination by the Board whether or not numerous persons are “employees” within the meaning of the Act.
2. Initially, the applications concerned eighty-three people (sixty-three in Board File No. 2712-90-M, seventeen in Board File No. 0791-91-M, and three in Board File No. 0602-92-M).
3. The Board authorized two Labour Relations Officers to inquire into and report to the Board with respect to the duties and responsibilities of the persons named in each of the three applications (also referred to in the decision as the “disputed persons”).
4. The parties were able to resolve their disputes with respect to the majority of the persons named in the applications and the status of only seventeen persons remains in dispute.
5. The Officers’ Reports consist of seven volumes of transcripts detailing the duties and responsibilities of the disputed persons and two volumes of exhibits. The Reports also contain agreements by the parties with respect to some of the duties and responsibilities of the disputed persons.
6. The parties made written representations concerning the conclusions the Board should reach in view of the Labour Relations Officers’ Reports and replied to each other’s representations.

General Legal Framework - Managerial Exclusion

7. The rationale for the exclusion of persons who exercise managerial functions from the operation of the Act was summarized by the Board in *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121:

2. Section 1(3)(b) excludes from collective bargaining persons who in the opinion of the Board exercise managerial functions. The purpose of the section is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibility and obligations as managerial personnel, and their responsibilities as trade union members or employees in the bargaining unit. Collective bargaining, by its very nature, requires an arm’s length relationship between the “two sides” whose interests and objectives are often divergent. Section 1(3)(b) ensures that neither the trade union nor its members will have divided loyalties.

8. A further purpose was identified by the Board in *Ford Motor Company of Canada Limited*, [1993] OLRB Rep. January 1:

14. In addition to the obvious examples of conflicting interests on the shop floor, there are broader, systemic concerns which require the exclusion of “management” from participation in trade union activities. For if management personnel were treated like ordinary employees, and were free to organize or promote particular trade unions, the freedom of these *other workers* could be undermined and the independence of *their trade unions* could be jeopardized. ...

15. Unless the alleged “managerial” personnel really *are* like other workers, and really *do not* have any significant authority over their fellow employees, nothing prevents them from using their influence *against* those workers or their union. ... Section 1(3)(b) not only defines who is

excluded from the collective bargaining process; it also identifies who is *prevented* from using “managerial” authority to interfere with the collective bargaining rights of others.

(emphasis in original)

9. With respect to the managerial exclusion, the discretion of the Board under section 1(3) operates on two levels as follows:

It operates *firstly* to exclude persons who can affect the terms and conditions of employment and/or the employment relationship of those in the employ of the organization and *secondly* it operates to exclude those who make decisions with respect to policy and the overall operation of the organization. (*Inglis Limited*, [1976] OLRB Rep. June 270 at 271)

10. The Board has further commented on these two levels in *The Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121:

3. ... In the case of so called “first line” managerial employees, the important question is the extent to which they make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit. In the case of more senior managerial personnel whose decision-making may have a less direct or immediate impact on bargaining unit employees, the Board has focused on the degree of independent decision-making authority over important aspects of the employer’s business. It is evident that persons making significant executive or business decisions should be considered a part of the “management team” even though they do not exercise the kind of direct authority over employees which is characteristic of a first line foreman.

11. In assessing each case the Board must have due regard to the nature of the industry, the nature of the particular business and individual employer’s organizational scheme. In this case, we are dealing with a university setting, and we examined the duties and responsibilities within the context of this particular university’s corporate structure. (See *Fanshawe College of Applied Arts and Technology*, [1991] OLRB Rep. Sept. 1044 at page 1047).

12. Although there “... is no universal ratio of supervisors to subordinates” (*Vagden Mills Limited*, [1982] OLRB Rep. June 968 at 971) one generally looks for a rational relationship between the number of supervisors and subordinates. “The fewer the number of subordinates the stronger the need for demonstrative evidence of managerial status - especially if the next level of management is in close proximity and seems to be closely involved in the ultimate decision-making.” (*Town of Ajax*, [1987] OLRB Rep. Sept. 1117 at paragraph 7, see also: *Kitchener Waterloo Hospital*, [1986] OLRB Rep. May 651 at paragraph 10).

13. Consultation or input should not be confused with decision-making.

14. Co-ordinating and directing the work of others is not akin to exercising managerial functions within the meaning of section 1(3) of the Act.

15. The situation of persons who exercise some degree of control over others, but who also perform bargaining unit work was discussed in *Falconbridge Nickel Mines Limited*, [1966] OLRB Rep. Sept. 379:

In other words, in determining an individual’s status, one cannot look at a portion of his duties

in isolation. If the functions of an allegedly “managerial” character occupy only a minor part of his time, it is unlikely that he will be excluded from the ambit of collective bargaining unless those functions involve a decisive impact on his fellow employees. (For example, a unilateral decision to fire an employee would be highly significant, even if the exercise of such power is infrequent; while incidental supervisory responsibilities do not raise the kind of conflict of interest underlying section 1(3)(b)).

See also *J. M. Schneider Inc.*, [1987] OLRB Rep. Mar. 381 at 389:

In addition, in view of the underlying purpose of the Act, an employer has some onus to organize its affairs so that its employees are not *occasionally* placed in such position of potential conflict of interest if that result can be readily avoided. Distributing labour relations functions, piece-meal, over a large number of individuals will not necessarily deprive them of their *prima facie* right to engage in collective bargaining. On the contrary, such dilution of responsibility may make it harder for the Board to find that *any of them* should be excluded. This is not to say that this Board has any right to dictate an employer’s managerial structure or business organization; however, where “managerial” or “confidential labour relations” functions are not clearly assigned to, or grouped in, particular positions or persons, it may be difficult for the Board to conclude that the requirements of section 1(3)(b) have been satisfied - bearing in mind that this involves both a qualitative and quantitative assessment, and that, ultimately, the onus rests upon the party seeking exclusion to establish the basis for it.

16. Authority over employees who are not in the bargaining unit (i.e. casual staff, students) in which the disputed person may be placed may not be as significant as if that authority was being exercised over bargaining unit employees. (*J. M. Schneider Inc.*, [1987] OLRB Rep. Mar. 381 at paragraphs 22 and 55).

Confidential Personnel

17. The “second branch” of section 1(3) of the Act, excludes from the Act persons employed in a confidential capacity in matters relating to labour relations. The basis for the exclusion was considered by the Board in *Kitchener Waterloo Hospital*, [1986] OLRB Rep. May 651, in part, as follows:

4. The second branch of section 1(3)(b) has a similar collective bargaining purpose: to exclude from a bargaining unit persons who have access to confidential material relating to labour relations, so that the employer can know that its internal strategies and communications are known and handled exclusively by persons of undivided loyalty (see *Town of Gananoque*, [1981] OLRB Rep. July 1010). Access to information which may be “confidential” is not, by itself, sufficient to exclude an employee from the application of the Act since what is important is not the confidentiality of the information, but rather its labour relations content and potential collective bargaining use. For example, the secretary to the industrial relations manager may have no independent managerial authority, but may still be privy to the employer’s collective bargaining strategy or other sensitive labour relations information. At its most prosaic level, even a clerk or a stenographer who takes minutes at a management meeting to plan the employer’s collective bargaining posture should not be faced with a potential conflict of loyalty because of his/her membership in the bargaining unit. However, as the Board indicated in *York University*, [1975] OLRB Rep. Dec. 945:

...the Board must be satisfied of “a regular, material involvement in matters relating to labour relations” to justify a finding excluding a person from operation of the Act. (See, *The Falconbridge Nickel Mines Ltd. case*, [1969] OLRB Rep. September 379). Mere access to confidential information that may pertain to labour relations, standing alone, is no reason for excluding employees from the bargaining unit. (*The Metropolitan Separate School Board case*, [1974] OLRB Rep. Apr. 220). Nor is mere knowledge of matters that may be deemed “confidential” in the sense that the employer would not approve of the disclosure of such information by his employees sufficient to justify a positive finding under section 1(3)(b). (See *The Comtech Group Limited case*, [1974] OLRB Rep. May 291) The important test is whether there is a consistent

exposure to confidential information on matters relating to labour relations so as to constitute such exposure an integral part of the employee's service to the employer's enterprise. (See *The Toledo Scale Division of Reliance Electric Limited* case, [1974] OLRB Rep. June 406).

Onus

18. The applicant asserted that the onus is on the party seeking to exclude employees from the scheme of the Act. The responding party submitted that the applicant has the onus to satisfy the Board that the disputed persons do not exercise managerial authority and/or are not employed in a confidential capacity in matters relating to labour relations. The responding party relied on the basic principle that the one who asserts must prove and noted the absence of a reverse onus provision with respect to section 108(2). The responding party further stated that this application arises, not in the context of a certification application, but in a context where the parties have a longstanding collective bargaining relationship. On this basis, it suggested that the Board decisions on onus, which arose in the context of certification applications, are not applicable. Rather, they submitted that the second "general approach" stated in the *The Corporation of the City of Thunder Bay* decision applies:

A party which is attempting to alter a status quo which reflected the earlier perceptions of the parties concerning an individual's status and which has apparently worked adequately for some years must recognize the importance of this historical dimension and be prepared to adduce clear evidence as to why a change is required to accommodate the interest section 1(3)(b) was designed to protect. (at page 1126)

19. The Board has not had to rely on the onus of proof with respect to any of the disputed persons. In each case, the Board was able to determine, on a balance of probabilities, the status of each of the disputed persons.

Evidentiary Matters

20. The applicant (also referred to in the decision as "YUSA") called as witnesses Patricia Foulkes, Administrative Assistant to the Sociology Department at the Faculty of Arts, Maureen Blenkhorn, Budget Officer in the Office of the Dean at Atkinson, Jane Grant, then President of YUSA, on leave from her position as a Lab Technician IV in the biology department, and Professor Tom Meininger, former Acting Dean at Atkinson College. Ms. Foulkes, Ms. Blenkhorn and Ms. Grant gave evidence with respect to their own duties and responsibilities. Professor Meininger gave evidence with respect to Maureen Blenkhorn's duties and responsibilities.

21. The responding party objected to the admission of this evidence since it was not evidence of the duties and responsibilities of any of the disputed persons. The applicant responded that this evidence is relevant to establish context and to show that bargaining unit members often have input in hiring decisions.

22. The Board reviewed the evidence and concluded that it is relevant to show that some bargaining unit members have input in the hiring process at York University. This is one factor, among many, that the Board considered in determining the status of the disputed persons.

23. The responding party further objected to the admission of twenty-four position questionnaires which described the duties and responsibilities of bargaining unit employees. The responding party asserted that the questionnaires are not relevant since they do not relate to the duties and responsibilities of any of the disputed persons. Further, the responding party objected to the admission of the questionnaires on the grounds that they were designed for pay equity pur-

poses and not for the purpose of determining managerial functions, they were outdated, and they constituted hearsay.

24. The applicant responded that the questionnaires contain relevant information about the scope of responsibilities of members of the bargaining unit. Where the respondent is relying heavily upon budgetary and hiring responsibilities (among other things) to justify the exclusion of certain people as managerial, the applicant argued that it should be entitled to advise the Board that a large number of employees - who have long been recognized by the respondent as properly included in the bargaining unit - exercise the same or similar responsibilities. The questionnaires, in the applicant's view, are reliable evidence in this regard, in that they include not only the comments of the employee, but also of his or her supervisor. With respect to the issue of hearsay, the applicant responded that each of the questionnaires was reviewed by the employee's manager, who had the right to agree, disagree, and/or add comments. Most managers took advantage of this, and did so. The questionnaires submitted by the applicant include both sets of comments. In these circumstances, the applicant submitted that the questionnaires can be regarded as an admission against interest, and thus can be admitted as an exception to the general rule against hearsay.

25. Having reviewed the position questionnaires, the Board concluded they are admissible. They are relevant to the issue of the context of this particular workplace where bargaining unit members have input into hiring decisions and exercise budgetary responsibilities. However, the date of the questionnaires, the purpose for which they were designed and the absence of testimony by the persons who actually performed those duties, lessened considerably the weight the Board placed on this evidence.

David Demonte

26. David Demonte is the Leisure Services Officer in the Department of Physical Education, Recreation and Athletics. He reports to the Assistant Co-ordinator, who reports to the Director, Athletics and Recreation. The top position in that department is the Vice-President. Mr. Demonte has been in this position since 1986.

27. The Recreation part of the department has four parts: intramurals, clubs, life-style programs and casual recreation. Mr. Demonte is responsible for intramurals and clubs. He does not exercise managerial authority over any bargaining unit employees.

28. In implementing the intramural program he oversees the hiring of approximately 160-180 casual staff, almost exclusively students. These students act as convenors, head officials and referees of the various intramural activities offered by the university. Some are volunteers. Others are paid according to the amount of work they do and can earn approximately twenty dollars to one thousand dollars annually. In addition, two students are employed to work evenings approximately twenty hours a week, twenty-four weeks a year. Mr. Demonte is responsible for all these part-time and casual workers.

29. At this University, students are often employed on a casual, part-time, or work study basis. None of them are in any bargaining unit. The exercise of managerial type functions over these non-bargaining unit workers, in this particular workplace, does not create the type of conflict of interest problems section 1(3) of the Act was designed to avoid. (*J. M. Schneider, supra*)

30. In running the intramural and club program Mr. Demonte operates within a budget of approximately \$70,000. Most of the budget is taken up by the salaries of the aforementioned workers. The remainder of the budget is used to purchase equipment or rent off-campus facilities. Mr. Demonte has complete signing authority for these expenditures. Although Mr. Demonte operates

independently within his area of expertise, he does not exercise such independent decision-making over important aspects of the operation of the university as to justify his exclusion from the operation of the Act.

31. Mr. Demonte is one of a five member Executive Committee consisting of two persons from Recreation, two persons from Athletics and the Director. During his employment, this committee once discussed cut-backs of personnel and programmes in the department. Mr. Demonte has one vote out of five on the committee. The committee recommendations are passed on to the Vice-President. This attendance at management meetings is not the kind of regular, material involvement in confidential matters relating to labour relations which would justify excluding him from the operation of the Act.

Margaret Wallace

32. Margaret Wallace is the Assistant Director of Athletics at Glendon College. She reports directly to the Director of Athletics and indirectly to the Dean of Student Affairs. She has been in the position for five years.

33. Ms. Wallace is responsible for designing and implementing all recreational and athletic programmes at Glendon. She is responsible for operating the Pro-Shop, liasing on behalf of Glendon students in intramural programmes, and renting facilities within the Proctor Field House.

34. Ms. Wallace is responsible for scheduling programmes and events at the Proctor Field House, which generates approximately \$250,000.00 in revenue. Approximately \$100,000.00 of that amount is generated from rental of the premises, for which Ms. Wallace has full responsibility. She is also responsible for the entire operation of the Pro-Shop which generates revenues of approximately \$50,000.00 annually. Further, she has total responsibility for the equipment purchase budget of the department in the amount of approximately \$58,000.00.

35. These areas of operation are not central aspects of the operation of the university nor does her independent decision-making within that area impact on the economic lives of employees in such a way as to justify her exclusion from the operation of the Act.

36. There are currently four full-time employees in the department who are members of a bargaining unit represented by YUSA ("YUSA employees"). Generally the director is responsible for supervising the bargaining unit staff. In the absence of the director, Ms. Wallace is "in charge". In the absence of the director, she can authorize overtime or grant casual time off. However, the evidence suggests that this has not happened frequently. Ms. Wallace does no formal assessment of YUSA employees' work performance. She is not responsible for hiring or firing bargaining unit staff, although she has been involved in interviews to fill positions of bargaining unit staff. However, this input must be weighed in the context of the University's inclusive decision-making management style where bargaining unit members do from time to time sit on hiring panels. Although Ms. Wallace was advised by the director that she has the power to discipline or suspend the four bargaining unit staff in the department, she has never done so. It was apparent from Ms. Wallace's evidence that although the four YUSA members report to her it is the director who has effective responsibility for these employees.

37. In addition, Ms. Wallace has responsibility for approximately twenty fitness instructors, twenty-five life-guards and five Pro-Shop staff. Many of these part-time, casual employees are students. It should be noted that the twenty-five life-guards report primarily to the recreation assistant, a bargaining unit member, who then reports to Ms. Wallace. The fact that a member of the YUSA bargaining unit exercises responsibility for these casual employees without affecting *her* sta-

tus as an employee reinforces the Board's view that responsibility over non-bargaining employees is not a significant factor in this workplace.

38. The Board concludes that Ms. Wallace does not exercise managerial functions and her inclusion in a bargaining unit does not create the type of conflict of interest problems section 1(3) of the Act was designed to avoid.

Terry Carter

39. Terry Carter is the Co-ordinator, Policy and Research for the Faculty of Education. She reports to Stanley Shapson, Dean of the Faculty of Education. At the time she was examined, she had been in her position for seven months.

40. Ms. Carter is part of the Dean's office and the only member of the Policy and Research Department. She is responsible for Policy, Research and Governance (Committee and Faculty Council Work).

41. Ms. Carter is responsible for developing program proposals and for responding to papers and reports generated from a number of sources including the Ministry of Education. One example of a program proposal in which Ms. Carter was involved was a proposal to the Ontario Council of University Affairs with respect to a French as a First Language program. Ms. Carter was involved in determining what information to include in the proposal, discussed the contents of the proposal with the Dean, and drafted portions of the proposal. If the proposal is accepted and receives funding, it would add one hundred full-time equivalents to the faculty enrolment and would therefore have a significant impact on the Faculty of Education in the areas of academic planning, *staffing* and budget.

42. Similarly, Ms. Carter's responsibility for responding to papers and reports on issues could have significant impact on the Faculty of Education. Both these areas involve policy development for the Faculty of Education and in this regard, Ms. Carter works closely with the Dean.

43. Formulating policies with respect to which direction the Faculty of Education should pursue is an exercise of independent decision-making responsibility in matters of importance to the University. Further, those policies which she has a role in formulating could impact on staffing, which would put her in a position of conflict with bargaining unit employees.

44. In addition to her policy work, Ms. Carter is the secretary of the Faculty Council which is comprised of all full-time faculty in the Faculty of Education and representatives from other faculty. The Faculty Council votes on major policy changes and new courses. She is also the secretary of several committees of Faculty Council: the co-ordinating and planning committee, the curriculum committee, the petitions and awards committee and the tenure stream appointments committee. As secretary she drafts the agenda, takes minutes, provides clarification, makes recommendations and acts as a resource person to the committee. She does not have a vote on any of these committees.

45. After Ms. Carter's examination, Dean Shapson testified to an additional duty carried out by Ms. Carter, the supervision of one YUSA bargaining unit employee employed in the Education Resource Centre. The applicant objected to the admission of Dean Shapson's evidence on the basis that Ms. Carter was not performing this function at the time of her examination. The responding party submitted that the Board should admit and consider this evidence on the basis that it reflects Ms. Carter's true duties and responsibilities, albeit new duties and responsibilities. It should be noted that each of the disputed persons described his/her duties at the time he/she was

examined. At the time Ms. Carter was examined, she had already been given responsibility for the Education Resource Centre, including supervisory responsibility for the YUSA bargaining unit employee who staffs that Centre, although she had not yet exercised such supervision. In light of the fact that the examinations took place over an extended period of time, that each of the disputed persons described his/her duties at the time of his/her examination, and that Ms. Carter had already been assigned the supervisory duties in question at the time of her examination, the Board will consider Dean Shapson's evidence.

46. With respect to the bargaining unit employee in the Education Resource Centre, Ms. Carter is responsible for assigning work, monitoring work, disciplining (up to termination), granting time off, approving leaves of absence, approving vacation requests and authorizing overtime. In light of all her duties, the Board concludes that Ms. Carter exercises managerial functions and is therefore *not* an employee within the meaning of section 1(3) of the Act.

Reuben Tang

47. Reuben Tang is employed as the Administrative and Production Supervisor of Design and Production. He reports to the Assistant Director of the Communications department, who reports to the Director. The applicant made no submissions with respect to Mr. Tang.

48. It was submitted by the employer that Mr. Tang exercises independent discretion with respect to significant expenditures of York University funds and on this basis, he should be found to exercise managerial functions within the meaning of the Act. Mr. Tang supervises the printing of work for the University community. Approximately six hundred thousand dollars worth of printing is contracted to outside printers and Mr. Tang is responsible for this contract work. In addition he drafts the proposed budget for his department which he discusses with the Assistant Director and then submits to the Director.

49. Five YUSA staff members report to Mr. Tang; two graphic designers, one typesetter, one graphic artist and one secretary. Mr. Tang assigns and monitors their work. He hired the secretary. He has responsibilities for training employees and instructing them how the work should be done. He has been asked to indicate whether or not a probationary employee should be kept on. Mr. Tang has authority to grant time off, to grant a leave of absence and to schedule vacations. He can authorize overtime and he initiated the decision to pay overtime to employees instead of offering them time in lieu. He has suggested to employees a need for improvement. Mr. Tang has authority to suspend and discharge an employee although he has not yet had occasion to do so. He also received job re-evaluation requests from three of his staff and initiated re-evaluations for the remaining staff.

50. Based on his supervisory responsibilities for five bargaining unit members, the Board finds that Mr. Tang exercises managerial functions within the meaning of the Act and is therefore excluded from the operation of the Act.

Don Murdoch

51. Don Murdoch is the Fine Arts Liaison Officer. He reports to the Manager of Public Relations and Development and has been in his position for three years. Mr. Murdoch is responsible for student relations, including deciding how York University will be represented to students and developing strategies for student retention.

52. One full-time YUSA employee (Assistant to the Liaison Officer) reports to Mr. Murdoch. This employee was hired by Mr. Murdoch and was granted a one year leave of absence

by him. In addition he hired a YUSA employee on a contract basis to replace the assistant during her leave of absence.

53. Mr. Murdoch is responsible for training, instructing, assigning work and deadlines, authorizing overtime, assessing the work and recommending improvement with respect to the assistant. He made the decision to retain his assistant at the completion of her probationary period.

54. Although Mr. Murdoch exercises managerial authority over only one employee, the evidence demonstrates that he has significant impact on her economic life as an employee and his inclusion in a bargaining unit would place him in a conflict of interest position. This is not the type of situation suggested in the *Town of Ajax* case, referred to earlier, in which the next level of management is in close proximity and seems to be closely involved in the ultimate decision-making. The Board concludes that Mr. Murdoch exercises managerial functions within the meaning of section 1(3) of the Act.

Michael Ecob

55. Michael Ecob has been employed since 1978 as the Advertising and Publications Officer. He works in the Editorial and Publications section of the Communications department and reports to the Assistant Director, who reports to the Director.

56. Mr. Ecob's primary duties and responsibilities are production of the undergraduate calendar, advertising, and listings in national and international directories. Although Mr. Ecob works independently in carrying out those responsibilities, the Board does not find those areas are of such importance to the operation of the university as to justify his exclusion from the protection of the Act.

57. Although two bargaining unit positions under his direction and control existed "on paper", Mr. Ecob was not supervising anyone at the time of his examination and had not been doing so for at least one year prior to that. As a result of the hiring freeze imposed by senior management of the university, there are no foreseeable plans to fill these positions. Although there are two clerical people in the department to whom he assigns work, they are not under his control or direction. The Board concludes that Mr. Ecob does not exercise managerial functions at the present time, and is therefore an employee within the meaning of the Act.

Marilyn DiFlorio

58. Marilyn DiFlorio has been the Administrative Officer in the Office of Research Administration since 1987. She reports to the Director. The department administers all research grants for the University.

59. Ms. DiFlorio functions as the Office Manager and has six YUSA employees reporting to her: a receptionist, two secretaries, an administrative assistant, an assistant information office and an information officer. Initially, the Director was responsible for supervising the staff in the department. However, in light of an increase in the Director's duties, she recommended the creation of Ms. DiFlorio's position to act as direct supervisor of the employees.

60. Ms. DiFlorio effectively recommended the hiring of five of the six YUSA employees and recently made recommendations which eliminated the position of one. She effectively recommended whether or not a probationary employee should be released or retained. She is responsible for training new employees. She instructs them as to the proper method and manner in which their work should be done and checks and corrects their work. She has the authority to suspend or disci-

pline an employee although the occasion to do so has not arisen. She has authority to grant casual time off and to grant leaves of absence in accordance with the collective agreement. She can authorize overtime. On the basis of the above, the Board concludes that Ms. DiFlorio exercises managerial functions within the meaning of section 1(3) of the Act.

Diane Bates/Linda Keith

61. Diane Bates and Linda Keith both work in the Department of Private Fund-raising and report to the Acting Manager of the department. Ms. Keith is a Manager, Alumni Fund-raising, and Ms. Bates is a Fund-raising Manager. Ms. Keith had been in her position for three and a half years at the time of her examination and Ms. Bates was in her second year.

62. Their department is responsible for raising funds through private sources. Ms. Keith is responsible for raising funds from Alumni and Ms. Bates is responsible for raising funds through the Community Business Suppliers Programme, the Parent's Programme and Faculty Staff Fund-raising. There is one bargaining unit position under their joint direction and control. The position is currently vacant, although there is evidence that it would likely be filled shortly. When the position was filled, Ms. Bates and Ms. Keith jointly assigned the secretary work, supervised her work performance. They could grant casual time off or authorize overtime and could recommend discipline or discharge of this employee.

63. Although the evidence is not clear on this point, it appears that while the position of secretary reporting to them is vacant, they currently share the services of another YUSA secretary in the department. They both assigned this secretary work, monitored her work performance, and recommended areas for improvement. They believe they have the authority to discipline this secretary although the occasion to do so has not arisen.

64. Quantitatively, the truly managerial functions that Ms. Bates and Mr. Keith exercise jointly over the one secretary is minimal. As stated in *J. M. Schneider Inc.*, *supra*, "an employer has some onus to organize its affairs so that its employees are not *occasionally* placed in such a position of potential conflict of interest if that result could be readily avoided." Excluding two employees from the protection of the Act on the basis that they jointly exercise minor managerial functions over one employee, which managerial functions could easily be assigned elsewhere, is not justified in the context of the scheme of the Act.

65. Ms. Keith and Ms. Bates hire approximately twenty-four to twenty-seven students who engage in casual or part-time tele-marketing under their supervision. The Board does not find the supervision of these non-bargaining unit employees to be a significant factor in this workplace.

66. For the reasons set out above, the Board finds that Ms. Keith and Ms. Bates do not exercise managerial functions and are therefore employees within the meaning of the Act.

Sheila Creighton

67. Sheila Creighton is the Convocation Officer. She reports to the Director of Student Affairs who reports to the Assistant Vice-President, Campus Relations and Affairs. She has been in her position since April 1988.

68. Ms. Creighton is responsible for convocation at York University. There are approximately 7,000 graduates annually and Ms. Creighton's responsibilities are very important to York University's public relations. Ms. Creighton is responsible for determining the site of the cere-

mony, for negotiating and entering into contracts on behalf of the University, for scheduling the ceremony, and for securing the diplomas.

69. Although Ms. Creighton works independently in carrying out her duties for Convocation, we do not find that she exercises the kind of independent decision-making over such important aspects of the university as would justify her exclusion from the Act.

70. Two work study students work for two six-week periods under her supervision. As well, a number of casual employees are hired for the convocation ceremony itself. None of these employees are members of any bargaining unit. We do not find her supervision of these casual employees to be significant in determining her status under the Act.

71. One full-time YUSA employee, a Convocation Assistant, reports to Ms. Creighton. This position has been vacant on two occasions and Ms. Creighton has hired the person to fill the vacancy on each occasion. She was asked to indicate in writing at the end of the employee's probationary period whether the employee had performed satisfactorily. Ms. Creighton assigns work to the Assistant, provides training, and checks and corrects her work. Ms. Creighton has not had occasion to dismiss an incumbent in the YUSA position reporting her. However, she is currently in the process of addressing unsatisfactory work performance by this employee and has met with a Labour Relations person from Human Resources for guidance on how to proceed further.

72. Although Ms. Creighton exercises managerial functions over only one YUSA employee, the evidence demonstrates that she has significant impact on this employee's economic life, and her inclusion in a bargaining unit would place her in a conflict of interest position. The Board concludes that Ms. Creighton exercises managerial functions and is therefore not an employee within the meaning of the Act.

Anita Herrmann

73. Anita Herrmann is the Financial Aid Administrator and the Co-ordinator, Prestigious Awards. She reports to the Director of Financial Aid and Prestigious Awards and she has been in her current position for two years.

74. Ms. Herrmann is responsible for granting bursaries to students in financial need, for administering the guidelines of the Canada Scholarship Programme, for giving advice to potential scholarship donors, and for administering private awards once they have been approved by Senate. Overall, she is responsible for significant sums of money. Nonetheless, the Board concludes that Ms. Herrmann does not exercise such independent decision-making in areas of importance to the university as would justify her exclusion from the Act.

75. There is one bargaining unit employee under her direction and control, the Administrative Assistant. She assigns work to this employee, monitors the work, can grant casual time off and can authorize overtime. Although Ms. Herrmann has been told that she has the power to hire, fire, and discipline this one employee, she has never done so. She did not know whether she would need approval to do so.

76. Additionally, Ms. Herrmann oversees a work study student in the department. When the administrative assistant took a maternity leave, it was the Director who made the decision to replace the administrative assistant with the work study student already working in the department.

77. In light of the fact that there is only one YUSA employee at issue and the fact that Ms.

Herrmann's immediate supervisor, the Director, has effectively exercised managerial functions concerning this employee, the Board finds that Ms. Herrmann does not exercise managerial functions within the meaning of the Act.

Penny Bissett

78. Penny Bissett is the Assistant Director of Secondary School Liaison. She reports to the Associate Director of Admissions and Liaison who reports to the Director of the department. She has been in the position for two and a half years.

79. The department is responsible for the recruitment of students to York University. Ms. Bissett is in charge of the recruitment of secondary school students. She contributes to the formulation of recruitment strategies and then implements them. She is responsible for assigning, scheduling and supervising liaison staff. On an annual basis, she organizes the training conference for liaison staff throughout the campus. Except as described below, the liaison staff are excluded from the YUSA bargaining unit.

80. During the recruitment season, which occurs from approximately mid-August until December, Ms. Bissett hires three YUSA employees on contract to attend at various schools for the purpose of recruiting potential applicants.

81. Ms. Bissett initiated the recommendation that contract staff be hired on a seasonal basis and since that time has hired approximately nine YUSA contract staff. She is responsible for training the contract employees for their liaison responsibilities. She performs a formal assessment of their work and decides whether to retain or reject contract staff for the duration of the contract.

82. Ms. Bissett has authority to grant the contract staff casual time off, authorize overtime and schedule vacations. She monitors their time-keeping. On one occasion she investigated and reported on a Workers' Compensation claim with respect to a contract employee.

83. Ms. Bissett exercises direct supervisory responsibilities with respect to these bargaining unit employees. Although this aspect of her work only occurs on a seasonal basis, approximately four months a year, during that time her supervisory responsibilities form a significant portion of her work load. Further, there is no evidence that this type of supervisory responsibility could be transferred to anyone else in the department. The Board concludes that Ms. Bissett exercises managerial functions and is therefore not an employee within the meaning of the Act.

Lawrence Mattiussi/Jim Priestly/Walter Joost

84. Lawrence Mattiussi has been employed as a Project Co-ordinator in the Operations department for approximately eight years. He reports to the Superintendent of Maintenance who reports to the Director of Operations who reports to the Assistant Vice-President, Physical Resources. The function of the Operations department is to maintain existing services, i.e., electricity, plumbing, furnishings, exterior and structural content.

85. Mr. Mattiussi is assigned projects by his immediate supervisor and advised how many dollars can be spent. Once assigned a project, he has total authority and responsibility to ensure that it progresses smoothly, on schedule and according to the assigned budget. Mr. Mattiussi selects contractors from an approved list and oversees their work. Mr. Mattiussi's particular area of concentration is housing (i.e., drapery, carpeting, painting) and he is responsible for the roofs on campus.

86. Mr. Mattiussi has been involved in projects valued from one dollar to three hundred thousand dollars. He indicated that he consults with more senior people on the larger projects.

87. Approximately eighty per cent of Mr. Mattiussi's projects are contracted to outside contractors. On some projects, university employees may be involved, where they are indirectly under Mr. Mattiussi's direction and control. However, he does not exercise direct managerial functions with respect to these employees.

88. Jim Priestly has been employed as a Project Co-ordinator since 1990. He reports primarily to the Director of Construction, Physical Resources Group, and occasionally to the Interim Director, Facilities and Planning. With respect to one project he reported directly to the Assistant Vice-President, Physical Resources. His department is involved in the demolition, rehabilitation and remodelling of university space.

89. Like Mr. Mattiussi, Mr. Priestly is assigned a project by his immediate supervisor and he works within a specified budget. He is responsible for choosing a contractor, generally from an approved list, and is responsible for the completion of the project. This involves inspecting the work on a regular basis to ensure that it is being done properly; authorizing change orders as well as approving interim payments, and withholding final payments until the work is completed.

90. The dollar value of projects on which Mr. Priestly has worked ranged from less than ten thousand dollars to over two million dollars for the asbestos removal program. He indicated that approximately eighty per cent of his projects were valued at less than ten thousand dollars.

91. Some of the projects are completed internally by university employees. Although he has overall responsibility for the work, he does not exercise direct managerial functions over any bargaining unit employees.

92. Walter Joost is employed as a Project Co-ordinator in the Construction department. He reports to the Director of Construction and the Assistant Vice-President, Physical Resources. He has been in this position for five years.

93. The Construction Department does new construction and major renovation work. Like Mr. Mattiussi and Mr. Priestly, Mr. Joost is assigned projects from the supervisor and is responsible for the entire project to ensure that it progresses according to expectation, standard, budget and time.

94. Mr. Joost works on projects from a minimal dollar size to approximately two million dollars, and many of his projects involve large sums of money.

95. Once assigned a project he has a role in estimating the cost. If the project is greater than ten thousand dollars, it is sent out to tender. Mr. Joost decides which contractors will be invited to bid on the tender, generally from a standard list, and puts together the tender package. On very large projects Mr. Joost may also be involved in hiring a consultant. In projects estimated at less than ten thousand dollars Mr. Joost chooses the contractor without tender. Once the project has commenced, Mr. Joost is responsible for its completion and is responsible for authorizing payment to contractors both on a periodic basis and upon completion of the project.

96. York University bargaining unit employees may be employed on some of Mr. Joost's projects. Although he is responsible for all matters on the projects, including employees, he does not exercise direct managerial functions with respect to those employees.

97. Additionally, Mr. Joost was assigned the task of re-estimating a very large renovation budget known as the “ripple programme” which he re-estimated at a cost of approximately \$970,000.00.

98. Notwithstanding the degree of independence with which Messrs. Mattiussi, Priestly and Joost carry out their projects and the amounts of money for which they have responsibility, the Board finds that they exercise technical and specialized expertise, rather than managerial functions. There is nothing in the nature of their work which would be inconsistent with their status as employees. The Board finds that they are employees within the meaning of the Act.

Bachar Amer

99. Bachar Amer is employed as a Construction Engineer/Project Administrator in the Physical Plant, Construction Division. He reports to the Director of construction who reports to the Assistant Vice-President, Physical Resources. The work of the department is new construction.

100. Mr. Amer is generally involved in one to three projects at a time. He may become involved as early as the concept or planning stage, when the end users of the building are solicited for input. He also participates in the design of the project with architects and engineers. He is involved in the bidding stage, both sending out tenders and receiving bids back. Once the contract is awarded and work commences, he has on-the-job responsibility to inspect the work, approve payments, approve change orders, approve design changes and test and approve mechanical and electrical equipment. It is his responsibility to ensure that the final paperwork and accounting is completed. Following the construction of new buildings, it is Mr. Amer's responsibility to “commission” the building. That means that he establishes that the work was completed and receives documentation and warranties. He is then responsible for “handing over” completed buildings, which is the process of transferring responsibility of the building from the Construction Division of the university to the Operations and Maintenance Division of the university.

101. Mr. Amer was involved in completing the construction of Calumet College. He had initially become involved in the project when it was fifty per cent completed. He revised the budget estimate at a total cost of approximately twenty-one million dollars, seventeen million of which was allocated for construction. The second project which Mr. Amer has been involved in is the construction of a science building. The entire budget is twenty-five million dollars of which eighteen million dollars was allocated for construction. Mr. Amer has overall responsibility for the money allocated for construction.

102. There are some differences between the work of Mr. Amer as Project Administrator and the work of Messrs. Mattiussi, Priestly and Joost as Project Co-ordinators. Construction of a new building requires involvement in every aspect of the new building, whereas maintenance or renovation involves only those areas being maintained or renovated. The size of a new project increases the complexity of the co-ordination and decision-making functions required. Further, there are some additional duties which are unique to new construction such as “commissioning” and “handing over”. He is responsible for significantly larger sums of money. Although the position of Project Administrator requires a higher level of qualification, experience and expertise, the Board concludes that Mr. Amer essentially exercises technical and specialized expertise rather than managerial functions.

103. Although Mr. Amer is responsible for large sums of money, he is not the person who decides whether the money will be spent. The Vice-President of Physical Resources reviews the prospective projects and makes effective recommendations to the Vice-President, Finance and Administration about which maintenance and construction projects the university will undertake.

The Board concludes that Mr. Amer does not exercise such independent decision-making over important aspects of the business of the university as to justify his exclusion from the Act. The Board finds that Mr. Amer is an employee within the meaning of the Act.

Marion Stehouwer

104. Marion Stehouwer is the Manager of Administrative Computing and Telecommunication Services. She reports to the Director of Facilities and Support Services for Atkinson College. The department is responsible for the physical furnishings of Atkinson College, support services (i.e. print shop, mail services, stationery stores), the Administrative Computing Section and Micro Lab, desktop design publications, and word-processing. The Director oversees this Department and has twelve people reporting to her, one of which, Ms. Stehouwer, is currently excluded from the bargaining unit.

105. Within the department, Ms. Stehouwer is responsible for overseeing and managing all administrative computing systems within Atkinson College. Specifically, she is responsible for the Micro Lab facility which houses twenty-five computers, and which is used for classes, drop-in hours for students, and computer training for faculty and staff. Ms. Stehouwer is also responsible for standardizing Atkinson College technology, assessing the College's computing equipment requirements, and purchasing the required equipment.

106. Ms. Stehouwer has two full-time YUSA bargaining unit employees under her direction and control: the Micro Lab Assistant and the Technical Support Assistant. Ms. Stehouwer effectively recommended that the position of Micro Lab Assistant be created, which was done on a one year contract basis. She hired the person to fill that position. The employee temporarily in the position of Technical Support Assistant was not hired by Ms. Stehouwer. However, she has written the job description for the position and will shortly be involved in hiring a person to fill that position.

107. With respect to these two employees, Ms. Stehouwer is responsible for monitoring, prioritizing, assigning, checking and correcting their work. She has authority to grant them casual time off, approve vacation, and authorize overtime.

108. Although there is another level of supervision, the Director of the department, who has general responsibility for the department, the Director does not have the technical expertise required to supervise the staff in Ms. Stehouwer's area. The Board finds that Ms. Stehouwer exercises managerial functions with respect to these two bargaining unit employees and is therefore excluded from the operation of the Act.

Summary of Findings

109. In summary, the Board concludes that the following persons exercise managerial functions and are therefore *not* employees within the meaning of the Act: Terry Carter, Reuben Tang, Don Murdoch, Marilyn DiFlorio, Sheila Creighton, Penny Bissett, and Marion Stehouwer.

110. The Board concludes that the following persons are employees within the meaning of the Act: David Demonte, Margaret Wallace, Michael Ecob, Diane Bates, Linda Keith, Anita Herrmann, Lawrence Mattiussi, Jim Priestly, Walter Joost, and Bachar Amer.

1. With respect to my colleagues I dissent from their findings with regard to those persons who the majority decision declares to be employees within the meaning of the Act.

2. As stated in paragraph 2 of the majority decision, the applicant initially filed a section 108(2) application for positions occupied by eighty three (83) employees and this number was reduced, following discussions between the parties, to the present seventeen (17) which are the subject of this decision.

3. It is my view that for the respondent to maintain its position with respect to the seventeen employees, after having had ample opportunity to consider that position over an extended period of time should suggest to the Board that there are good and sufficient reasons to maintain the status quo.

4. In addition, the information contained in the Labour Relations Officer's report supports the view that *all* of the seventeen (17) employees should remain excluded, the most obvious being - Margaret Wallace, Anita Hermann, Lawrence Mattiussi, Jim Priestly, Walter Joost, and Bachar Amer.

5. With respect to Messrs. Mattiussi, Priestly and Joost, I believe that the majority decision is in error when it states in paragraph 97 of the majority decision that "...The Board finds that they exercise technical and specialized expertise, rather than managerial functions." The implication here seems to be that the distinctions are mutually exclusive and that an individual cannot exercise managerial functions if his responsibilities are somehow technical or specialized. Board jurisprudence does not support such a finding.

6. The independent managerial decision - making responsibilities of Messrs. Mattiussi, Priestly, and Joost, will clearly place them in positions of conflict with their employer if they are included in the bargaining unit.

7. With respect to Ms. Margaret Wallace, the majority decision concedes that Ms. Wallace has the authority to exercise functions that should clearly exclude her from the bargaining unit, see paragraph 36 of the majority decision which reads as follows:

...In the absence of the director, Ms. Wallace is "in charge". In the absence of the director, she can authorize overtime or grant casual time off. However, the evidence suggests that this has not happened frequently....

and then at paragraph 36 the majority goes on to state:

...Although Ms. Wallace was advised by the Director that she has the power to discipline or suspend the four bargaining unit staff in the department, she has never done so....

8. Both of the above mentioned quotations clearly indicate that Ms. Wallace is in a position that requires the exercises of managerial functions and by placing Ms. Wallace within the bargaining unit the Board is creating the potential for serious labour relations problems. The fact of the infrequent exercise of managerial functions cannot be determinative of managerial status, it is the authority vested in the individual that dictates managerial status.

9. In the case of Ms. Anita Hermann, I believe that the majority decision erred when, in paragraph 74 it confirms that Ms. Hermann has one bargaining unit employee under her direction and control, assigns work, can grant casual time off and can authorize overtime - all indicators used by the Board in determining managerial status - and yet in paragraph 76 it states:

...finds that Ms. Hermann does not exercise managerial functions within the meaning of the Act....

My comments at the conclusion of paragraph 8 above apply to Ms. Anita Hermann as well.

10. With respect to Mr. Bachar Amer, I find that the importance of his function in the management of the enterprise clearly designates his position as managerial - excluded. For the reasons outlined in paragraph 5 of this dissent, I cannot subscribe to the notion that technical and specialized expertise excludes the exercise of managerial functions.

11. I believe that it is also important to consider that the parties had agreed to exclude the seventeen (17) positions from the scope of collective bargaining - in at least one case dating back to 1985, and that the applicant has not shown that there were changes in job/position content significant enough to warrant changes in the status quo with respect to managerial exclusion.

12. For all of the above reasons, I would find that in the unique circumstances of this case, all of the seventeen (17) employees should remain excluded employees for purposes of the Act.

COURT PROCEEDINGS

2526-89-G (Court File No. 210/92) Ellis-Don Limited, Applicant v. The Ontario Labour Relations Board and International Brotherhood of Electrical Workers, Local 894, Respondents

Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Motions Court judge granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Motion to produce various reports and documents dismissed - Full panel of Divisional Court allowing appeal and setting aside order of motions court judge

Board decision reported at [1992] OLRB Rep. Feb. 147. Motions court decision reported at [1992] OLRB Rep. July 885.

Ontario Court of Justice, Divisional Court, O'Driscoll, H.J. Smith and Adams JJ., January 14, 1994.

The Court:**I. Nature of Proceedings**

The Ontario Labour Relations Board (O.L.R.B.), the Union and the Attorney General of Ontario (A.G.), as intervenor, appeal to the Divisional Court under s. 21(5) of the *Courts of Justice Act* from an order of Steele J., (sitting as a single judge of the Divisional Court), dated July 17, 1992, compelling the attendance of the chair, vice-chair (Susan Tacon) and Registrar of O.L.R.B. before an Official Examiner to give evidence with respect to procedures implemented by the O.L.R.B. in arriving at its Final Decision, dated February 28, 1992 in *Ellis-Don Limited*, [1992] O.L.R.B. Rep. February 147. The motion before Steele J. purported to be pursuant to rules 31.03(1), 34.01, 34.10 and 39.03 of the Rules of Civil Procedure.

II. Background

1. The Union filed a grievance with the O.L.R.B. alleging that Ellis-Don had violated a Provincial Agreement between Electrical Trade Bargaining Agency of the Electrical Contractors' Association of Ontario and the International Brotherhood of Electrical Workers of the I.B.E.W. Construction Council of Canada. It was alleged that Ellis-Don had sublet electrical construction work contrary to the collective agreement.

2. Ellis-Don denied the grievance and asserted that it was not bound by the Provincial Agreement.

3. A panel of the O.L.R.B. heard the grievance.

4. The panel of the O.L.R.B. rendered its Final Decision (*supra*) on February 28, 1992. The panel of the O.L.R.B. found Ellis-Don bound by the terms of the Provincial Agreement and upheld the grievance.

5. Later, Ellis-Don received a copy of a Draft Decision of the panel of the O.L.R.B., dated "December 1991". The Draft Decision would have denied the grievance.

[See: affidavit of R.D. McMurdo, Application Record: Tab 2]

6. Between the date of the Draft Decision and the date of the Final Decision, a meeting of the full Board of the O.L.R.B. was called at the request of Ms. Susan Tacon, Vice-chair of the O.L.R.B. and the chair of the panel that heard the matter. The full O.L.R.B. reviewed the Draft Decision.

7. The differences between the draft and final decision:

(a) One of the issues before the panel of the O.L.R.B. was whether I.B.E.W., Local 894 had abandoned its bargaining rights with regard to a Working Agreement signed by Ellis-Don in 1962 that bound it to a series of Provincial Agreements commencing in 1978.

I.B.E.W., Local 894, was required in Schedule F on form 87 of the Regulations, made pursuant to the *Labour Relations Act*, to include in an Application for Accreditation the names of all the employers with whom the union was entitled to bargain. Ellis-Don's name had not been included on Schedule F. Ellis-Don asked the panel of the O.L.R.B. to draw an adverse inference against I.B.E.W., Local 894 to the effect that the Union had abandoned its bargaining rights.

(b) In the Draft Decision, the panel of the O.L.R.B. found that I.B.E.W., Local 894 had abandoned its bargaining rights regarding Ellis-Don.

(c) In the Final Decision (*supra*), the panel of the O.L.R.B. found that Local 894's omission to list Ellis-Don on Schedule F did not constitute an abandonment of its right to bargain with Ellis-Don.

8. On April 8, 1992, Ellis-Don launched an application for judicial review of the decision of the panel of the O.L.R.B. seeking an order to set aside and quash the Final Decision on the basis of an allegation that Ellis-Don had been denied natural justice by the actions of the panel of the O.L.R.B.

9. Counsel for Ellis-Don wrote to counsel for the O.L.R.B. indicating Ellis-Don's intention to subpoena for examination under oath the following persons from the O.L.R.B.:

1. the chair, and
2. vice-chair (Susan Tacon), and
3. Registrar

Counsel for Ellis-Don alleged that the subpoenae were served so that he could obtain information with regard to the procedures implemented by the O.L.R.B. in regard to its final decisions generally and this case in particular.

10. Counsel for O.L.R.B. refused consent to the examination under oath and also refused the production of the documents requested in the subpoenae.

11. Ellis-Don launched two (2) motions seeking orders:

(A). Staying the Final Decision of the panel of the O.L.R.B. of February 28, 1992 (*supra*) until the judicial review had been heard and to prohibit the O.L.R.B. from hearing any other related grievances.

(B). Compelling the chair, vice-chair (Susan Tacon) and Registrar of the O.L.R.B. to attend before an Official Examiner to obtain information regarding procedures implemented by the panel of the O.L.R.B. in reaching its Final Decision of February 28, 1992 and for an order for production of any reports etc. of the O.L.R.B. regarding general procedure regarding full O.L.R.B. hearings.

12. On June 22 and June 24, 1992, Steel J., sitting as a single judge of the Divisional Court, heard these motions and reserved judgment.

13. On June 26, 1992, Steele J. refused to stay the February 28, 1992 Final Decision of the O.L.R.B. and said:

In the present case, the material before me, relating to the application for judicial review, does not show a strong *prima facie* case [that a breach of natural justice has occurred]. The principle of a whole Board review procedure by the O.L.R.B. has been expressly approved by the Supreme Court of Canada in *Consolidated-Bathurst Packaging Ltd., the I.W.A. Local 2-69 et al.*, [1990] 1 S.C.R. 282. In view of the strong privative clause protecting all O.L.R.B. decisions, the mere fact that a different decision was arrived at after the full board review, from the prior draft decision, does not present a strong *prima facie* case.

14. On July 17, 1992, for written reasons, Steele J. granted an order compelling the three (3) persons (*supra*) to attend for examination under oath pursuant to rule 34.10 of the Rules of

Civil Procedure. Steele J. dismissed the motion asking that the O.L.R.B.'s documents be produced.

15. The O.L.R.B., I.B.E.W., Local 894, Attorney General of Ontario (Intervenor), each served and filed a Notice of Appeal from the July 17, 1992 order of Steele J. that compelled the chair, vice-chair and Registrar of the O.L.R.B. to be examined as witnesses in a pending motion, namely, the application for judicial review.

16. These appeals are brought under the provisions of s. 21(5) of the *Courts of Justice Act*.

If and insofar as orders are needed to extend the time prescribed by rule 61.16(6), to serve, file and regularize these three (3) appeals, with the consent of Ellis-Don, the necessary orders shall issue.

17. The application for judicial review has been adjourned to await the outcome of these collateral proceedings.

III. Analysis

1. In *Consolidated Bathurst*, [1990] 1 S.C.R. 282, 335, Gonthier J. drew a distinction between discussions of the full O.L.R.B. concerning the "facts" of a case, as opposed to discussions with respect to legal or policy issues:

In every decision, panel members must determine what the facts are, what legal standards apply to those facts and, finally, they must assess the evidence in accordance with these legal standards. ... The determination and assessment of facts are delicate tasks which turn on the credibility of the witnesses and an overall evaluation of the relevancy of all the information presented as evidence. As a general rule, these tasks cannot be properly performed by persons who have not heard all of the evidence and the rules of natural justice do not allow such persons to vote on the result. Their participation in discussions dealing with such factual issues is less problematic when there is no participation in the final decision. However, I am of the view that generally such discussions constitute a breach of the rules of natural justice because they allow persons other than the parties to make representations on factual issues when they have not heard the evidence.

Moreover, in the more recent decision of *Commission de affaires sociales v. Trembley et al.*, [1990] 1 S.C.R. 952, the Supreme Court of Canada, in a judgment delivered for a unanimous court by Gonthier J., declined to accord to an administrative tribunal employing a post-hearing consultative mechanism deliberative secrecy to the same extent as that accorded to the judiciary. In permitting questions to be put to the secretary of the commission which was subject to judicial review, he stated at p. 964:

In my opinion, the objection made by the Commission should be dismissed. The questions raised by the respondent did not touch on matters of substance or the decision makers' thinking on such matters. These questions were directed instead at the *formal process* established by the commission to ensure consistency in its decisions. They were concerned first with the institutional setting in which the decision was made and how it functioned, and second with its actual or apparent influence on the intellectual freedom of the decision makers.

He went on to observe at p. 965:

In the case of administrative tribunals, the difficulty of distinguishing between facts relating to an aspect of the deliberations which can be entered in evidence and those which cannot is quite understandable. The institutionalization of the decisions how administrative tribunals creates a tension between on one hand the traditional concept of deliberative secrecy and on the other the fundamental right of a party to know that the decision was made in accordance with the rule of natural justice. The institutionalized consultation process involving deliberation is the subject of

rules of procedure designed to regulate the "consensus tables" process. Paradoxically, it is the public nature of these rules which, while highly desirable, may open the door to an action in nullity or an evocation.

Mr. Justice Gonthier concluded at p. 966:

Accordingly, it seems to me that by the very nature of the control exercised over their decisions administrative tribunals cannot rely on deliberative secrecy to the same extent as judicial tribunals. Of course, secrecy remains the rule, but it may nonetheless be lifted when the litigant can present valid reasons for believing that the process followed did not comply with the rules of natural justice.

2. The applicant, Ellis-Don, argued before Steele J. that it would appear that the full O.L.R.B. engaged in a discussion of the facts of the case during the full Board meeting and that the Court was entitled to intrude upon the tribunal's deliberative secrecy to clarify the precise role that full Board played in the changing of the decision of the panel which actually heard the grievance in question. The principle evidence in support of this motion was that:

(a) the full O.L.R.B. meeting was called *after* the preparation of the draft and *before* the release of the Final Decision;

(b) the full Board meeting was requested by Vice-Chair, Susan Tacon, who chaired the panel of the Board who heard the case;

(c) the outcome of the case differed from the draft decision; and

(d) the difference between the draft and the Final Decision was with respect to the conclusion to be drawn from Ellis-Don's absence from the schedule of employers in the 1975 accreditation decision.

3. With respect to the essential differences between the Draft and the Final Decision, the critical focus of the applicant was on page 43 and 44 of the Draft Decision in contrast to page 44 of the Final Decision. It may be useful to set out the essential differences between the two decisions.

Draft Decision: p. 43-44:

53. The accreditation process is lengthy and complex. Certainly under the Board practice in force in January 1975, the process involved a detailed examination of the schedules filed with the Board and a final determination as to whether employers named on the schedules filed by the union had granted bargaining rights or were otherwise bound to the respondent union. Local 494, the applicant herein, called no evidence to explain the failure of Local 353 to include Ellis-Don on Schedule F, as would be expected if the union in the accreditation application thought it possessed bargaining rights vis-à-vis Ellis-Don. Absent an explanation, the most reasonable inference is that the union in the accreditation application assumed it did *not* possess such bargaining rights in 1971, when the accreditation application was filed. In effect, the union was asserting it did *not* have bargaining rights for *Ellis-Don*. The respondent union in the accreditation application must be taken to have abandoned whatever bargaining rights it possessed as against Ellis-Don at the latest by the point. The mere use by Ellis-Don of union electrical contractors is not tantamount to granting voluntary recognition anew once the bargaining rights created by the working agreement were extinguished.

54. The consequences of the Board's finding that bargaining rights had been abandoned by Local 353 I.B.E.W. prior to 1978 is that the trade union cannot "plug into" the province-wide scheme so that the issue of abandonment post 1978 does not arise. Local 494, the applicant in the instant grievance referral, relies on that province-wide scheme to acquire the bargaining rights which it seeks to enforce against Ellis-Don. In

the Board's view, no such rights were held by Local 353 in 1978 so that the legislation in 1978 and the subsequent amendments could not extend any bargaining rights to Local 494.

The applicant contrasts the preceding paragraphs with the following excerpt from the Final Decision (p. 44):

53. The accreditation process is lengthy and complex. Certainly under the Board practice enforce in January 1975, the process involved a detailed examination of the schedules filed with the Board and a final determination as to whether employers named on the schedules filed by the union had granted bargaining rights or were otherwise bound to the respondent union. Local 894, the applicant herein, called no evidence to explain the failure of Local 353 to include Ellis-Don on schedule F. Respondent counsel asserts that the most reasonable conclusion from the absence of Ellis-Don's name on Schedule F as submitted by the respondent union in the accreditation application is that Local 353, I.B.E.W. had abandoned by that point any bargaining rights which it may have earlier acquired.

54. The absence of evidence to explain the omission of Ellis-Don from the schedule F filed by Local 353, I.B.E.W. in the accreditation application is of concern to the Board. The question for the Board is whether this omission, of itself, is sufficient, in the context of all the other circumstances, to cause the Board to conclude that Local 353 had abandoned the bargaining rights it had earlier obtained. The omission of Ellis-Don's name is not inconsistent with abandonment and, thus, may signify what respondent counsel asserts. However, that omission is also consistent with an assumption on the part of the local that the accreditation application affected only specialty contractors or that schedule F speaks only to employers for whom the local held bargaining rights but who had had employees in the past year (albeit not within the previous (sic) year). It appears (and there is no cogent evidence to suggest otherwise) that the employer association represented speciality electrical contractors, not general contractors. In that context, the name of Ellis-Don may have been omitted in the respondent union's reply, as apparently were the names of other general contractors who had signed the working agreement to reflect the framing of the original application. The question is not what is the most reasonable or a reasonable inference from the omission of Ellis-Don's name but whether the omission signifies abandonment. In the Board's opinion, it is more probable than not that the omission of Ellis-Don's name from schedule F did not reflect an abandonment of bargaining rights. As well, the context of a consistent pattern of Ellis-Don's subletting electrical work to "union" contractors prior to the accreditation application, although not necessarily conclusive proof of the existence of bargaining rates (see paragraph 46 above) cannot be ignored. Given the Board's finding that the working agreement was duly executed by the parties and constituted a series of voluntary recognition agreements, including the voluntary recognition of Local 353, and given that the working agreement was never terminated but rather, that at least with respect to the subcontracting of electrical work, Ellis-Don fully complied with that agreement for many years with Ellis-Don receiving the advantages of the working agreement during that period, the Board is not satisfied, as a matter of fact, that the bargaining rights of Local 353 were abandoned because of the omission of Ellis-Don's name from schedule F. In short, considering all of the circumstances, the Board does not find that Local 353 abandoned its bargaining rights prior to the introduction of province-wide bargaining.

4. These passages were reviewed with Mr. Justice Steele as were the reasons of the Supreme Court of Canada in the *Consolidated Bathurst* and *Tremblay* cases (supra). As well, s. 111 of the *Ontario Labour Relations Act* was placed before him:

Section 111:

Except with the consent of the Board, no member of the Board, nor its registrar, nor any of its other officers, nor any of its clerks or servants shall be required to give testimony in any civil suit or in any proceeding before the Board or in any proceeding before any other tribunal respecting

information obtained in the discharge of their duties or while acting within the scope of their employment under this Act.

In compelling the attendance of the chair, vice-chair (Susan Tacon) and Registrar of the O.L.R.B. before an Official Examiner to give evidence with respect to the procedures implemented by the O.L.R.B. in arriving at its Final Decision and specifically with respect to its decision, dated February 28, 1992, Steele J. stated:

Judicial review is a civil suit (see *Canadian Workers Union, supra*). However, s. 111 cannot be used to deny a procedural investigation regarding natural justice. In *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 219, Wilson J., in reference to an argument relating to administrative procedures in sections 1 and 7 of the *Charter*, stated as follows:

...The principles of natural justice and procedural fairness which have long been espoused by our courts, and the constitutional entrenchment of the principles of fundamental justice in s. 7, implicitly recognize that a balance of administrative convenience does not override the need to adhere to these principles....

In my opinion, that statement can be applied to natural justice apart from any reference to the *Charter*. It refers to administrative procedures and not to an act of the Legislature such as s. 111. However, I cannot accept that the Legislature intended s. 111 to interfere with natural justice. As stated in *Newfoundland Telephone*, p. 299, administrative Boards that are adjudicative in nature will be expected to comply with the standard applicable to courts.

This motion must be dealt with on the ground of natural justice because the applicant, being a corporation, cannot rely on s. 7 of the *Charter* (see *Irwin Toy Ltd. v. Quebec (Attorney General)*, 58 D.L.R. (4th) 577). The principle of reading down legislation applies to constitutional cases and perhaps *Charter* cases. Section 111 protects the officers of the O.L.R.B. from being required to give testimony in a civil suit. Testimony is defined in Jowitt's Dictionary of English Law as being "the evidence of a witness given *viva voce* in a court of justice or other tribunal". The motion before me is not to require the officers to give testimony at a trial or hearing, but to require them to be discovered regarding procedural matters going to the issue of natural justice. If they cannot be discovered, then the information may never become available. I cannot believe that s. 111 was meant to deny information going to the issue of natural justice. Where the denial of natural justice is alleged, the purported violator cannot hide behind procedural legislation to deny the claimant the right to investigate whether or not he has been wronged.

I therefore conclude that s. 111 does not preclude the granting of an order to achieve the ends of natural justice.

Orders directing members of the O.L.R.B. to submit to examination should be granted sparingly. They should be granted only where there is an obvious appearance that natural justice may not have occurred. This is a lesser test than the strong *prima facie* case test required on stay applications.

In the present case, there is only the statement by counsel for the O.L.R.B. that its procedures in 1992 were the same as those considered in *Consolidated Bathurst*. There is no evidence as to who instigated the full Board review. There is a *prima facie* case that the final decision was changed on what is perhaps a question of fact. I believe that Ellis-Don has shown valid reason to believe that the procedures followed denied it natural justice, and that it is entitled to enquire as to the procedures followed. For these reasons an order will issue for the relief asked in para. 1 of the motion.

5. Under s. 21(5) of the *Courts of Justice Act*, a panel of the Divisional Court may, on motion, set aside or vary the decision of a judge who hears and determines a motion. The use of the phrase "set aside or vary" in s. 21(5) gives the panel all the powers of the single judge with respect to the proper disposition of the motion. See: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 21(5) and *Overseas Missionary Fellowship v. 578369 Ontario Ltd.* (1990), 73 O.R. (2d) 73 (C.A.).

The motion to compel the attendance of the O.L.R.B. members and the Registrar was brought pursuant to rule 39.03 of the Rules of Civil Procedure. Rule 39.03(1) states:

Subject to subrule 39.02(2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing.

In our view, Mr. Justice Steele was in error in construing the term "testimony" in s. 111 of the O.L.R.A. to refer only to *viva voce* evidence. Clearly the term "testimony" in the rules is not confined to oral testimony. See rules 30, 31, 35, 36, 39 and 53. Indeed, to construe s. 111 in such a manner would substantially undermine the purpose of s. 111 which is to insulate Board officials from the distraction, the expenditure of time, and the potential intimidation associated with testifying about their board related activities in other legal proceedings. From this perspective and from the point of view of how the term "testimony" is used in the rules of court, s. 111 ought to be given a broad and purposive construction.

6. This has been the approach of this court in preceding cases. For example, in *Consolidated Bathurst Packaging Ltd.* (supra), a motion was brought by the respondent trade union and O.L.R.B. for an order quashing a subpoenae directed to the chair, alternate chair, vice-chair, two Board members and two other Board officials. In quashing the subpoenae as requested, Mr. Justice Galligan, by endorsement dated September 11, 1984, determined that s. 109 (now s. 111) of the *Labour Relations Act* applied and constituted a bar to the taking of the evidence of the witnesses named in the subpoenae.

In *Re Canadian Workers Union and Frankel Structural Steel Ltd. et al.* (1976), 12 O.R. (2d) 560, the Registrar and chair of the O.L.R.B. had been subpoenaed and refused to attend the examination. The motions for contempt were dismissed by this court. It was held that an application for judicial review of a decision of a statutory tribunal is a civil suit and a motion for contempt was merely an ancillary proceeding to the application for judicial review. Accordingly, the Registrar and the Chair of the O.L.R.B. were protected from being cross-examined and for refusing to submit to examination for discovery by the terms of s. 98 (now s. 111 of the *Labour Relations Act*).

Other considerable support is found in *Cook v. Ip et al.* (1985), 22 D.L.R. (4th) 1 (Ont. C.A.); *Glover v. Glover et al.* (No. 1), (1980), 113 D.L.R. (3d) 161, confirmed on appeal by the Supreme Court of Canada: (1981), 130 D.L.R. (3d) 383; and *Agnew v. Ontario Association of Architects* (1987), 64 O.R. (2d) 8 (Div. Ct.). In *Cook v. Ip et al.* (supra), the Court of Appeal considered s. 23(5) of the *Health Services Insurance Act*, S.O. 1968-69, c. 43:

S. 23(5) No person engaged in the administration of this Act *shall be required to give testimony in any civil suit* or proceeding with regard to information obtained by him in the discharge of his duties, except in a proceeding under or authorized by this Act.

(Emphasis added)

Cook v. Ip involved a motion under what was then Rule 349 for the documentary discovery of non-parties. The Court of Appeal interpreted the word "testimony" broadly to include not only the giving of *viva voce* evidence in a court, but also the production of documents on discovery. However, s. 23(5) had been repealed from the statute in 1972 and it was the Court's view that the replacement subsection did not have the same comprehensive effect of its predecessor. In this respect, Mr. Justice Cory stated at p. 7:

It is important to note that s. 23(5) constituted a completed prohibition against an employee giving testimony concerning information obtained in the discharge of his duties. That prohibition was specific and precise. Section 23(5) was repealed in 1972. At the same time, a clause was

added which was very similar in wording to the present clause cl.44(2)(e): see *Health Insurance Act* 1972 (Ont.), c. 91.

The deletion of s-s 23(5) is of considerable significance. By deleting the section the Legislature removed the specific prohibition against giving testimony and producing documents pursuant to a subpoena of the court. The history of the legislation leads me to conclude that s. 44 of the present Act was not intended to be either a complete code or a prohibition against complete production. With the removal of that clear prohibition, it is appropriate to conclude that the court may once again exercise its inherent jurisdiction to ensure that all pertinent documents are before it.

Further, at p. 5, Mr. Justice Cory made it clear that the Legislature is capable of prohibiting certain persons from giving testimony and producing records of various kinds. In this respect, he stated:

On the other hand, it is quite clear that the Legislature may by statute prohibit OHIP employees from giving testimony producing its records at trial. An example of such a legislative prohibition is the *Income Tax Act* 1970-71-72 (Can.), c. 63; See *Glover v. Glover et al.* (No. 1) (1980), 29 O.R. (2d) 392, 113 D.L.R. (3d) 161, 18 R.F.L. (2d) 116. If the Legislature is to achieve that result, it must specify the restriction in clear and unambiguous terms.

Obviously, Cory J. accepted that s. 23(5), as previously quoted, was sufficiently clear and unambiguous.

In *Glover v. Glover et al.* (No. 1), (supra), referred to in *Cook v. Ip et al.* (supra), Mr. Glover had absconded with children and, despite all her efforts, Mrs. Glover had not seen or heard of them since. An order was made directing Mr. Glover to return the children to Mrs. Glover. That order was not obeyed. Ultimately, a petition for divorce was heard and Mrs. Glover was granted a *decree nisi* and custody of her children. Mr. Glover did not appear at the trial and an order was made directing, *inter alia*, Revenue Canada, Taxation to provide this court with particulars of the addresses of the respondents Paule Wenenn and James Glover pursuant to the *Family Law Reform Act*. Ultimately, the Attorney General of Canada appealed from that part of the order which referred to Revenue Canada, Taxation on the basis of section 241(2) of the *Income Tax Act* which provided:

Notwithstanding any other Act or law, no official or authorized person shall be required, in connection with any legal proceedings,

(a) to give evidence relating to any information obtained by or on behalf of the Minister for the purposes of this Act, or

(b) to produce any book, record, writing, return or other document obtained by or on behalf of the Minister for the purposes of this Act.

Notwithstanding the compelling circumstances, Associate Chief Justice MacKinnon, speaking on behalf of the Court of Appeal for Ontario, allowed the appeal and stated (D.L.R. p. 165):

Section 241, in my view, is a comprehensive code designed to protect the confidentiality of all information given to the Minister for the purposes of the *Income Tax Act*. The only exception to s. 241 found elsewhere in the *Income Tax Act* is contained in s. 149.1(15) [enacted 1976-77, c. 4, s. 60; am. 1979-80, c.5, s. 52] which explicitly states that, "notwithstanding s. 241", the Minister shall communicate to the public the information contained in the annual public information return required to be made by every registered charity by virtue of s. 149.1(14) [enacted *ibid.*]. Accordingly, unless the "Court" or Mrs. Glover can come within one of the exceptions found in s. 241 itself, the order herein was made without jurisdiction.

Section 241(1) makes it clear that:

“Except as authorized by this section”, no official shall communicate to “any person any information obtained by or on behalf of the Minister for the purposes of this Act” (emphasis added). To make the matter clear, as for as legal proceedings are concerned, s-s. (2) is added which states that:

“Notwithstanding any other Act or law, no official or authorized person [as defined] shall be required, in connection with any legal proceedings” to give evidence or produce any writing relating to any information obtained for the purposes of the Act (emphasis added). This is an all embracing section which, apart from the exceptions listed in s-s. (3), applies to “any legal proceedings” and to the Court”.

In *Re Agnew and Ontario Association of Architects* (1987), 64 O.R. (2d) 8, a motion was brought to quash eight subpoenas served by the applicant under rule 39.03 upon members of the Experience Requirements Committee of the Ontario Association of Architects. On an application for judicial review, the applicant sought to examine the members on their decision whether the applicant needed more specified experience before he could be licensed as an architect. The application was based on a variety of allegations including breach of natural justice and bias. Subsections 43(1) and 43(2) of the *Architects Act*, 1984, S.O. 1984, c. 12 provided:

43.(1) Every person engaged in the administration of this Act, including any person making an examination or review under s. 32 or an investigation under s. 38, shall preserve secrecy with respect to all matters that come to his knowledge in the course of his duties, employment, inquiry or investigation and shall not communicate any such matters to any other person except,

(a) as may be required in connection with the administration of,

(i) this Act and the regulations and by-laws, or

(ii) the *Professional Engineers Act*, 1984 and the regulations and by-laws under that Act,

or any proceedings under

(iii) this Act or the regulations, or

(iv) the *Professional Engineers Act*, 1984 or the regulations under that Act;

(b) to his counsel; or

(c) with the consent of the person to whom the information relates.

(2) No person to whom subsection (1) applies shall be required to give testimony or to produce any book, record, document or thing in any action or proceeding with regard to information obtained by him in the course of his duties, employment, inquiry or investigation except in a proceeding under this Act or the regulations or by-laws or a proceeding under the *Professional Engineers Act*, 1984 or the regulations or by-laws under that Act.

While Mr. Justice Campbell expressed the view that common sense exceptions to subsection 43(2) might well exist, they did not pertain to the general compellability of members of administrative tribunals to testify about their decision process. In granting the motion, Campbell J. set out the policy surrounding the sweeping protection provided for by subsection 43(2):

The onus is on the party attacking the subpoenas to displace the general rule that the party issuing the subpoenas has, *prima facie*, the right to issue them and to obtain the evidence sought.

These general rules are subject to certain exceptions. For instance, judges are not ordinarily compellable to testify about their decisions or the basis upon which they reach them: *Re Clendenning v. Board of Police Com'rs for City of Belleville* (1976), 15 O.R. (2d) 97, 75 D.L.R. (3d) 33, 33 C.C.C. (2d) 236 (Div. Ct.). The rule is not restricted to superior court judges. It is open,

in light of the comments of Martin J.A. in *R. v. Moran* (1987), 36 C.C.C. (3d) 225 at p. 239, 21 O.A.C. 257 at pp. 269-70, to conclude that the rule may extend to justices of the peace as well.

In a case of a judge subpoenaed to testify about something touching on this decision, a burden of persuasion shifts to the party issuing the subpoena to demonstrate that the evidence sought does not seek to penetrate the mental process by which the judge came to his decision.

The authorities do not make it clear whether this general rule applies equally to members of administrative tribunals. In logic, there is no reason why it should not. The mischief of penetrating the decision process of a tribunal member is exactly the same as the mischief of penetrating the decision process of a judge.

Apart from the practical consideration that tribunal members and judges would spend more time testifying about their decisions than making them, their compellability would be inconsistent with any system of finality of decisions. No decision and *a fortiori* no record, would be really final until the judge or tribunal member had been cross-examined about his decision. Instead of review by appeal or extraordinary remedy, a system would group up to review by cross-examination. In the case of a specialized tribunal representing different interests and mischief would be even greater because of the process of discussion and compromise among different points of view would not work if stripped of its confidentiality.

The reasons for not hearing the decision-maker relate largely to the finality of his decision. Section 13(4), set out above, provides that the committee's decision is final and is binding on both the registrar and on the applicant. This principal would be violated if the members were compellable to reveal their decision process.

Later at pp. 16-17, Campbell J. responded to the disclaimer by the applicant's counsel that he did not propose to delve into the mental processes of the members:

The applicant's counsel says he does not propose to delve in the mental processes of the members or their decision-making process but seeks rather to explore a distinct and different area; whether they considered the material that was put before them, whether they made their decision on the basis of the material before them, whether they each made their decision as individuals or deferred to the views of someone else, whether they prejudged the matter.

I see no distinction or difference between questions directed to those matters and questions directed to the decision process. The matters sought to be asked are at the heart of the decision-making process and are directly within the mischief sought to be prevented by the rule against penetrating the mind of the decision-maker.

7. Mr. Cherniak, on behalf of Ellis-Don, submitted that he needed to know what happened at the full O.L.R.B. meeting in the sense of what they discussed. Obviously, his client also wishes to know how that discussion impacted on the decision of the panel. Mr. Cherniak pointed out that it was not even clear that the approach to full Board meetings outlined in *Consolidated Bathurst* (supra) was still the Board's policy at the time the Ellis-Don matter came before the full Board. However, Ellis-Don has been told by counsel to the O.L.R.B. that the policy articulated by the Board in *Consolidated Bathurst* (supra) was applicable at all material times. Moreover, Ellis-Don has not sought a reconsideration of the Board's decision and an explanation for the differences between the draft and final decision. Subsection 108(1) of the *Labour Relations Act* provides:

The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

“Reconsideration” is generally a process restricted to allowing a party to adduce evidence or make representations which it did not have a previous opportunity to raise. This is precisely the situation in which Ellis-Don found itself in on discovering the Draft Decision and it was the process followed by *Consolidated Bathurst* (supra) when it learned its case had been discussed at a full Board meeting. However, in this case, it appears that Ellis-Don moved immediately to court because it did not want the Board’s explanation. As Mr. Cherniak, Ellis-Don’s counsel, vigorously expressed it: “We caught these people with their hand in the cookie jar”. Accordingly, any uncertainty in the factual circumstances surrounding the differences between the Draft and Final Decisions are uncertainties Ellis-Don created by the way it has chosen to proceed.

8. In our opinion, the facts of this case are precisely governed by s. 111. this provision, which was not present in *Tremblay* (supra), is designed to protect deliberative secrecy and guard against the chilling effect on the decision-making process which the potential of compellability to testify would engender. A Legislature clearly has the jurisdiction to modify the common law requirements of natural justice. Here, it has specifically and clearly prohibited one way in which a party might seek to establish a breach of natural justice. An exception for natural justice cannot reasonably be read into the section without undermining to a substantial degree its central purpose.

Clearly, there may be occasions when the provisions simply would not apply. For example, in *Bettes v. Boeing Canada* (1992), 10 O.R. (3d) 768 (Gen. Div.), Howden J., where there was the allegation that a Board member tampered with a witness, there are much stronger grounds for contending that the activity had nothing to do with the discharge of the member’s duties nor was he acting within the scope of his employment under the Act. If exceptions could reasonably and properly be read into the statute concerning natural justice, and we are of the view they cannot, the threshold would have to be in the nature of a strong *prima facie* case given the important policy of deliberate secrecy. In denying the stay application in this case, Steele J. found there was no such strong *prima facie* case and we would agree with that assessment. In our view, there was no justification to impose a lower threshold on the issue of whether members of a tribunal ought to be summoned for examination pursuant to rule 39.03.

Even if we were of the view that s. 111 was less protective and that the *Tremblay* (supra) approach applied, we are not of the view that the Draft Decision and the Final Decision reflect a significant change in factual analysis. Rather, we see a significant change in policy analysis insofar as the Board was required to consider the legal or policy effect of the failure of the trade union to place a contractor’s name on Schedule F of the accreditation forms. Ellis-Don had argued that the Board should continue to follow the approach of abandonment that it had in the past whereby the failure to place a contractor’s name on Schedule F was considered to be a *per se* admission of abandonment of bargaining rights. On the other hand, counsel for Local 894 had argued that a range existed of other possible explanations for the failure to place the name on the schedule. These included the possible view that the application for accreditation did not pertain to general contractors or at least to contractors who had never employed electricians directly. The concept of “abandonment” has been controversial in that it is not explicitly mentioned in the statute. Thus, the policy of abandonment has been characterized as “factual” when attacked on jurisdictional grounds. See: *Re Carpenters District Council of Lake Ontario v. Hugh Murray (1974) Ltd. et al.*; *Re Labourers International Union of America, Local 527 et al.* and *John Entwistle Construction Ltd. et al.* (1980), 33 O.R. (2d) 670, 125 D.L.R. (3d) 568 (Div. Ct.), leave to appeal refused: February 2, 1981 (C.A.). Nevertheless, the question of abandonment in the context of the failure of a trade union to place a contractor’s name on Schedule F is one of policy when considering whether or not the absence of the name should be treated as a *per se* signifying abandonment. In our view, it is this policy issue which is treated differently between the two decisions and this is precisely the kind

of industrial relations issue which the Supreme Court of Canada has said may be discussed in a full Board meeting. See: *Consolidated Bathurst Packing Ltd. v. International Woodworkers of America Local 2-69*, [1990] 1 S.C.R. 282, 337, per Gonthier J.:

It is true that the evidence cannot always be assessed in a final manner until the appropriate legal test has been chosen by the panel and until all the members of the panel have evaluated the credibility of each witness. However, it is possible to discuss the policy issues arising from the body of evidence filed before the panel even though this evidence may give rise to a wide variety of factual conclusions. In this case, Mr. Wightman seemed to disagree with Chairman Adams with respect to the credibility of the testimonies of some of the appellant's witnesses. While this might be relevant to Mr. Wightman's conclusions, it was nevertheless possible to outline the policy issues at stake in this case from the summary of the facts prepared by Chairman Adams. In turn, it was possible to outline the various tests which could be adopted by the panel and to discuss their appropriateness from a policy point of view. These discussions can be segregated from the factual decisions which will determine the outcome of the case once a test is adopted by the panel. The purpose of the policy discussions is not to determine which of the parties will eventually win the case but rather to outline the various legal standards which may be adopted by the Board and discuss their relative value.

Policy issues must be approached in a different manner because they have, by definition, an impact which goes beyond the resolution of the dispute between the parties. While they are adopted in a factual context, they are an expression of principal or standards akin to law. Since these issues involve the consideration of statutes, past decisions and perceived social needs, the impact of a policy decision by the Board is, to a certain extent, independent from the immediate interests of the parties even though it has an effect on the outcome of the complaint.

Finally, we make reference to the Ontario Court of Appeal's decision in *Khan v. College of Physicians and Surgeons of Ontario* (1992), 9 O.R. (3d) 641, 672-673, where Mr. Justice Doherty stated:

There is no single formula or procedure referable to the drafting process that can be uniformly applied across the very broad spectrum of decision-making, when determining whether the involvement of the non-decision-maker in the drafting process compromised the fairness of the proceedings or the integrity of the process. The nature of the proceedings, the issues raised in those proceedings, the composition of the tribunal, the terms of the enabling legislation, the support structure available to the tribunal, the tribunal's workload, and other factors will impact on the assessment of the propriety of procedures used in the preparation of reasons. Certainly, the judicial paradigm of reason writing cannot be imposed on all boards and tribunals: *I.W.A. v. Consolidated-Bathurst Packaging Ltd.*, supra, at pp. 323-24 S.C.R., pp. 1 342-43 O.A.C.

It must also be recognized that the volume and complexity of modern decision-making all but necessitates resort to "outside" sources during the drafting process. Contemporary reason-writing is very much a consultative (sic) process during which the writer of the reasons resorts to many sources, including persons not charged with the responsibility of deciding the matter, in formulating his or her reasons. It is inevitable that the author of the reasons will be influenced by some of these sources. To hold that any "outside" influence vitiates the validity of the proceedings or the decision reached is to insist on a degree of isolation which is not only totally unrealistic, but also destructive of effective reason-writing.

IV. Decisions rendered since the conclusion of argument of these appeals

We have read and considered the decisions of:

(a) *Glengarry Memorial Hospital v. Ontario (Pay Equity Hearings Tribunal)* (1993), 99 D.L.R. (4th) 682

per O'Leary J. (sitting as a single judge of Ont. Div. Ct.)

(b) *Glengarry Memorial Hospital v. Ontario (Pay Equity Hearings Tribunal)*

On April 15 and April 16, 1993, Hartt, Southey and Dunnet JJ. heard a motion to set aside the order of O'Leary J. in the *Glengarry* case. In the result, the order of O'Leary J. was "varied by providing that Mr. Dudar may be examined only as to the procedures followed by the Tribunal in the *Glengarry* case and the adequacy of the material now furnished as providing evidence of the reasons for his concern".

(c) *Welland County General Hospital v. Ontario (Pay Equity Hearings Tribunal)* (1993), 10 Admin. L.R. (2d) 232

per Carruthers J. (sitting as a single judge of Ont. Div. Ct.) (See also: *Policing the Consolidated-Bathurst Limits - of Whistleblowers and Other Assorted Characters*, David J. Mullan 10 Admin. L.R. (2d) 241)

We are of the view that the issues faced by O'Leary J. and by Carruthers J. bear no relation to the issues faced by us in these appeals. Accordingly, in our view, no useful purpose would be served by a process of comparing and contrasting those issues with the issues at bar.

V. Result

For all these reasons, the motions are allowed and that portion of the order of Mr. Justice Steele, dated July 17, 1992, compelling the chair, vice-chair (Susan Tacon), and Registrar of the O.L.R.B. to attend before an Official Examiner to obtain information with respect to the procedures implemented by the Board in arriving at its Final Decision and specifically with respect to its decision, dated February 28, 1992, is set aside.

VI. Costs

The applicant, Union, shall have its costs both in this Court and those incurred before Steele J. Accordingly, Steele J.'s order as to costs is set aside and Ellis-Don is directed to pay the International Brotherhood of Electrical Workers, Local 894, the sum of \$5,000 costs for its costs before Steele J. and \$4,500 for its costs before this panel of the Divisional Court. There is further no other order as to cost.

There will be no order as to costs of the motion to disqualify Adams J.

2476-89-R; 2477-89-R; 2478-89-R; 2479-89-R; 2480-89-R (Court File No. 155/93)
Ontario Public Service Employees Union, Applicant v. The Crown in Right of Ontario as represented by the Ministry of Correctional Services and **St. Leonard's Society of Metropolitan Toronto** and Community Liaison Services and Black Inmates and Friends Assembly, Respondents

Bargaining Rights - Crown Transfer - Judicial Review - Ministry of Correctional Services contracting with several community organizations to provide various services to inmates including discharge planning, cultural liaison, and counselling - Whether each contract constituting transfer of part of Crown's "undertaking" to the community agency - Board not persuaded that the right to perform particular services created by subcontract is "part" of Crown's "undertaking" to which

bargaining rights attach or which create successor ship on execution of contract - Crown transfer application dismissed by Board - Divisional Court dismissing union's application for judicial review

Board decision reported at [1993] OLRB Rep. Jan. 56.

Ontario Court of Justice, Divisional Court, Callaghan C.J.O.C., Hartt and Dunnet JJ., January 4, 1994.

CALLAGHAN C.J.O.C. (endorsement): In dismissing the application the Board made the following finding of fact: "In our view, there has been no "transfer" of "part" of the Crown's "undertaking" to any of the respondents, and therefore no successorship or extension of OPSEU's bargaining rights to the respondent's employees" (see decision p. 115). This factual finding is clearly within the jurisdiction of the Board. We do not find this ruling, in the circumstances, patently unreasonable. Conflicting decisions of an administrative tribunal do not give rise to a right of judicial review in the absence of a patently unreasonable decision.

The decision of the Board in the K.B.M. case, was affirmed by this Court, only to the extent it was not patently unreasonable. No exhaustive interpretation of the word "undertaking" was given or intended. What was said is that the term "undertaking" *can* include a disposition or transfer of services. Again, this becomes a question of fact for the Board to determine. In the result this application must be dismissed.

Costs in the sum of \$3,000.00 *each* are awarded to the Respondents the St. Leonard's Society of Metro Toronto and the Attorney General of Ontario appearing on behalf of the Crown. The OLRB did not seek any costs.

3178-91-G (Court File No. 23752) The Toronto-Dominion Bank, Applicant v. United Brotherhood of Carpenters and Joiners of America, Local 785, Ontario Labour Relations Board, Attorney General of Canada and Attorney General of Ontario, Respondents

Constitutional Law - Construction Industry - Construction Industry Grievance - Judicial Review - Board dismissing employer's submission that construction of banks by bank employees within sphere of federal labour relations - Board assuming jurisdiction to deal with grievance - Bank seeking judicial review - Divisional Court finding construction of new bank building to be ordinary construction activity and within provincial jurisdiction - Judicial review application dismissed - Motion for leave to appeal dismissed by Court of Appeal - Application for leave to appeal to Supreme Court of Canada dismissed

Board decision reported at [1992] OLRB Rep. Oct. 1123; Divisional Court decision reported at [1993] OLRB Rep. June 578; Court of Appeal decision noted at [1993] OLRB Rep. June 578.

Supreme Court of Canada, L'Hereux-Dube, Gonthier and McLachlin JJ., January 27, 1994.

The Court: The application for leave to appeal is dismissed with costs.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 1993

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2566-91-R: Ontario Nurses' Association (Applicant) v. West Lincoln Multi-Level Health Facility Inc. (Respondent)

Unit #1: "all registered and graduate nurses employed by West Lincoln Multi-Level Health Facility Inc. in a nursing capacity in its nursing home the Deer Park Villa in the Town of Grimsby, save and except the Director of Nursing, persons above the rank of Director of Nursing and persons regularly employed for not more than 24 hours per week" (2 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all registered and graduate nurses employed by West Lincoln Multi-Level Health Facility Inc. regularly employed for not more than 24 hours per week in a nursing capacity in its nursing home the Deer Park Villa in the Town of Grimsby, save and except the Director of Nursing, persons above the rank of Director of Nursing" (5 employees in unit) (*Having regard to the agreement of the parties*)

3093-91-R: Ontario Nurses' Association (Applicant) v. South Muskoka Memorial Hospital (Respondent)

Unit #1: "all registered and graduate nurses employed in a nursing capacity by South Muskoka Memorial Hospital in the Town of Bracebridge, save and except nursing co-ordinator, nurse manager and persons above the rank of nursing co-ordinator, nurse manager and persons regularly employed for not more than 24 hours per week" (42 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all registered and graduate nurses employed in a nursing capacity by South Muskoka Memorial Hospital in the Town of Bracebridge regularly employed for not more than 24 per week and students employed during the school vacation period, save and except nursing co-ordinator, nurse manager and persons above the rank of nursing co-ordinator and nurse manager" (45 employees in unit) (*Having regard to the agreement of the parties*)

3464-91-R: Ontario Nurses' Association (Applicant) v. Mon Sheong Home for the Aged (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: "all registered and graduate nurses employed in a nursing capacity at Mon Sheong Home for the Aged in the Municipality of Metropolitan Toronto, save and except the Directors of Nursing and persons above the rank of Director of Nursing" (11 employees in unit) (*Having regard to the agreement of the parties*)

0065-92-R: Ontario Nurses' Association (Applicant) v. Community Lifecare Inc. c.o.b. as Community Nursing Home, Alexandria, Ontario (Respondent)

Unit #1: "all registered and graduate nurses employed in a nursing capacity by Community Lifecare Inc., in the Town of Alexandria, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except the Administrator, Director of Care/Nursing, and persons in bargaining units for which any trade union held bargaining rights as of April 3, 1992" (5 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all registered and graduate nurses employed in a nursing capacity by Community Lifecare Inc., in the Town of Alexandria, save and except the Administrator, Director of Care/Nursing, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and per-

sons in bargaining units for which any trade union held bargaining rights as of April 3, 1992" (5 employees in unit) (*Having regard to the agreement of the parties*)

0626-92-R: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. Financial Times Corporation Limited (Respondent)

Unit: "all employees of the respondent employed in the Editorial Department of the Financial Times in the Municipality of Metropolitan Toronto and the Regional Municipality of Ottawa-Carleton, save and except Publisher, Editor, Managing Editor, Executive Secretary and persons regularly employed for not more than 24 hours per week" (20 employees in unit)

0680-92-R: The International Association of Bridge, Structural and Ornamental Ironworkers Local 721 (Applicant) v. Canadian BBR (1980) Inc. (Respondent) v. Labourers' International Union of North America, Locals 183 and 506 (Intervener)

Unit: "all ironworkers and ironworkers' apprentices in the employ of Canadian BBR (1980) Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers' apprentices in the employ of Canadian BBR (1980) Inc. in all sectors of the construction industry excluding the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (23 employees in unit)

0924-92-R: Ontario Nurses' Association (Applicant) v. Victorian Order of Nurses, South Renfrew Branch (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the Victorian Order of Nurses, South Renfrew Branch in the Town of Arnprior, save and except Supervisors and persons above the rank of Supervisor" (22 employees in unit) (*Having regard to the agreement of the parties*)

1945-92-R: Ontario Nurses' Association (Applicant) v. Diversicare I Limited Partnership (Respondent)

Unit #1: "all registered and graduate nurses employed in a nursing capacity of Diversicare I Limited Partnership at its Oxford Regional Nursing Home in the Town of Ingersoll, save and except the Director of Resident Care, persons above the rank of Director of Resident Care, persons regularly employed for not more than 24 hours per week and persons for whom any trade union held bargaining rights as of October 5, 1992" (2 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all registered and graduate nurses employed in a nursing capacity of Diversicare I Limited Partnership at its Oxford Regional Nursing Home in the Town of Ingersoll regularly employed for not more than 24 hours per week, save and except the Director of Resident Care, persons above the rank of Director of Resident Care, and persons for whom any trade union held bargaining rights as of October 5, 1992" (4 employees in unit) (*Having regard to the agreement of the parties*)

2256-92-R: Ontario Nurses' Association (Applicant) v. Wingham and District Hospital (Respondent) v. Group of Employees (Objectors)

Unit #1: "all Registered and Graduate Nurses employed in a nursing capacity by the Wingham and District Hospital in the Town of Wingham, save and except Nursing Co-ordinator, persons above the rank of Nursing Co-ordinator, the Director of the Nursing Assistant School, persons regularly employed for not more than 24 hours per week and supervisors" (20 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all Registered and Graduate Nurses employed in a nursing capacity by the Wingham and District Hospital in the Town of Wingham regularly employed for not more than 24 hours per week, save and except Nursing Co-ordinator, persons above the rank of Nursing Co-ordinator, the Director of the Nursing Assistant School and supervisors" (38 employees in unit) (*Having regard to the agreement of the parties*)

2721-92-R: Ontario Nurses' Association (Applicant) v. Palmerston and District Hospital (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity of Palmerston and District Hospital in the Town of Palmerston, save and except Head Nurses and persons above the rank of Head Nurse” (35 employees in unit) (*Having regard to the agreement of the parties*)

3253-92-R: Ontario Nurses’ Association (Applicant) v. Manitoulin Centennial Manor Home for the Aged (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity by Manitoulin Centennial Manor, Home for the Aged, in the Town of Little Current, save and except Director of Nursing” (11 employees in unit) (*Having regard to the agreement of the parties*)

3302-92-R: United Steelworkers of America (Applicant) v. Securiton Canada, A Division of Canadian Protection Services Limited (Respondent)

Unit: “all employees of Securiton Canada, A Division of Canadian Protection Services Limited, in its Securiton Canada Division in the Municipality of Metropolitan Toronto, save and except field supervisors and persons above the rank of field supervisors” (80 employees in unit) (*Having regard to the agreement of the parties*)

3478-92-R: Ontario Nurses’ Association (Applicant) v. Canadian Red Cross Society (Respondent)

Unit: “all registered graduate nurses employed in a nursing capacity by the Canadian Red Cross Society, Blood Services London Centre and Windsor Sub Centre, save and except Clinic Managers, Assistant Nursing Managers, persons above the rank of Clinic Manager and Assistant Nursing Manager” (18 employees in unit) (*Having regard to the agreement of the parties*)

3530-92-R: Ontario Nurses’ Association (Applicant) v. Extendicare Health Services Inc. (Respondent)

Unit: “all Registered and Graduate Nurses employed in a nursing capacity by Extendicare Health Services Inc. at Hearst Nursing Home, save and except Administrator/Director of Care and persons above the rank of Administrator/Director of Care” (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0873-93-R: Employees’ Association of Ottawa-Carleton (Applicant) v. Renfrew County Roman Catholic Separate School Board (Respondent)

Unit: “all office, clerical and technical employees of the Renfrew County Roman Catholic Separate School Board in the County of Renfrew save and except for: managers, persons above the rank of manager, Payroll Supervisor, Computer Systems Co-ordinator, Audio Visual Technical Co-ordinator, Executive Secretary to the Director of Education and Recording Secretary, Executive Secretary for the French Language Section, Secretary to the Superintendent of Business, Secretary to the Assistant to the Superintendent of Business, Cultural and Pastoral Animators, employees engaged in maintenance, service and plant operations who, if eligible, would be covered by a subsisting collective agreement, students engaged on a work experience or on a co-operative education program, students employed during school vacation periods, French First Language Monitors, Bus and Yard Supervisors, Bus Monitors, Noon Hour Supervisors and all employees for whom any trade union held bargaining rights as of June 10, 1993” (141 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1003-93-R: IWA - Canada (Applicant) v. Shaw Industries Ltd. c.o.b. as Canusa (a Division of Shaw Industries Ltd.) (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Shaw Industries Ltd. c.o.b. as Canusa (A Division of Shaw Industries Ltd.) in the Town of Huntsville, save and except Foremen, persons above the rank of foreman, office and sales staff, engineers employed in their professional capacity, students employed in a co-operative training program, students employed during the school vacation period and the Shipper-Expeditor” (53 employees in unit) (*Having regard to the agreement of the parties*)

1158-93-R: Ontario Nurses’ Association (Applicant) v. Ontario Cancer Treatment and Research Foundation, Kingston Regional Cancer Centre (Respondent)

Unit: "all Registered and Graduate Nurses employed in a nursing capacity by Ontario Cancer Treatment and Research Foundation, Kingston Regional Cancer Centre in the City of Kingston, save and except Nursing Supervisor, persons above the rank of Nursing Supervisor and persons for whom any trade union held bargaining rights as of July 6, 1993" (12 employees in unit) (*Having regard to the agreement of the parties*)

1391-93-R: Ontario Nurses' Association (Applicant) v. Englehart and District Hospital Inc. (Respondent)

Unit: "all Registered and Graduate Nurses employed in a nursing capacity by the Englehart and District Hospital Inc., in the Town of Englehart, save and except Head Nurses and persons at or above the rank of Head Nurse" (15 employees in unit) (*Having regard to the agreement of the parties*)

1411-93-R: Ontario Nurses' Association (Applicant) v. North Park Nursing Home Ltd. (Respondent)

Unit: "all Registered and Graduate Nurses employed in a nursing capacity by North Park Nursing Home Ltd. in the Municipality of Metropolitan Toronto, save and except the Director of Care and persons above the rank of Director of Care" (5 employees in unit) (*Having regard to the agreement of the parties*)

1498-93-R: Canadian Union of Public Employees (Applicant) v. Carleton University Students' Association Inc. (Respondent)

Unit: "all employees of Carleton University Students' Association Inc. in the City of Ottawa, save and except Department Heads, persons above the rank of Department Head and employees in bargaining units for which any trade union held bargaining rights as of August 5, 1993" (22 employees in unit) (*Having regard to the agreement of the parties*)

1923-93-R: Laundry and Linen Drivers and Industrial Workers Union, Local 847 (Applicant) v. CMP Group (1985) Ltd. (Respondent)

Unit: "all employees of CMP Group (1985) Ltd. in the Town of Oakville, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (2 employees in unit) (*Having regard to the agreement of the parties*)

2057-93-R: United Food and Commercial Workers International Union, A.F.L. C.I.O. C.L.C. (Applicant) v. 779395 Ontario Limited (Respondent)

Unit: "all employees of 779395 Ontario Limited c.o.b. as the Richmond in the City of Belleville, save and except supervisors, persons above the rank of supervisor, and bookkeeper" (27 employees in unit) (*Having regard to the agreement of the parties*)

2236-93-R: United Steelworkers of America (Applicant) v. Ken Bodnar Enterprises Inc. (Respondent) v. Group of Employees (Intervener)

Unit: "all employees of Ken Bodnar Enterprises Inc. in the Town of Collingwood, save and except Store Manager, Service Manager, Automotive Manager, persons above the rank of Store Manager, Service Manager, Automotive Manager and Office Manager, and the Head Cashier" (29 employees in unit)

2371-93-R: Ontario Nurses' Association (Applicant) v. The Willett Hospital Corporation (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by The Willett Hospital Corporation in the Town of Paris, save and except Nurse Managers, persons above the rank of Nurse Manager and employees for whom any trade union held bargaining rights as of October 6, 1993" (56 employees in unit) (*Having regard to the agreement of the parties*)

2411-93-R: United Steelworkers of America (Applicant) v. 913719 Ontario Ltd. c.o.b. as Adults Only Video (Respondent)

Unit: "all employees of 913719 Ontario Ltd. c.o.b. Adults Only Video in the City of London, save and except Store Manager and persons above the rank of Store Manager" (12 employees in unit)

2454-93-R: Labourers' International Union of North America, Local 1059, (Applicant) v. Ogden Allied Building Services Inc. (Respondent)

Unit: "all employees of Ogden Allied Building Services Inc. employed in the City of London, save and except non-working forepersons and persons above the rank of non-working forepersons" (6 employees in unit)

2677-93-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local 736 (Applicant) v. BMI Inc. (Respondent)

Unit: "all iron workers and iron worker apprentices in the employ of BMI Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all iron workers and iron worker apprentices in the employ of BMI Inc. in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2711-93-R: United Food and Commercial Workers International Union (Applicant) v. Dinecorp Inc. (Respondent)

Unit: "all employees of Dinecorp Inc. c.o.b. as Swiss Chalet Restaurant in the City of Sudbury, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager" (48 employees in unit)

2758-93-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: "all employees of Meadowvale Security Guard Services Inc. employed at 5 and 15 Vicora Linkway and 10 Macey Street in the Municipality of Metropolitan Toronto, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor" (7 employees in unit) (*Having regard to the agreement of the parties*)

2773-93-R: Service Employees Union, Local 210 (Applicant) v. Maisonville Court Incorporated (Respondent)

Unit: "all employees of Maisonville Court Incorporated in the City of Windsor save and except supervisors, persons above the rank of supervisors and registered nurses" (31 employees in unit)

2789-93-R: Canadian Union of Professional Security-Guards (Applicant) v. North American Security Services Inc. (Respondent)

Unit: "all employees of North American Security Services Inc. in the Regional Municipality of Ottawa-Carleton, save and except Mobile Supervisors, persons above the rank of Mobile Supervisor, Control Centre Operators, office, sales and technical staff, client service representatives and persons in bargaining units for which any trade union held bargaining rights as of November 10, 1993" (95 employees in unit) (*Having regard to the agreement of the parties*)

2801-93-R: United Steelworkers of America (Applicant) v. Intertec Security & Investigation Ltd. (Respondent)

Unit: "all security guards of Intertec Security & Investigation Ltd. at 33, 55, 77 and 201 City Centre Drive in the City of Mississauga, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor" (3 employees in unit) (*Having regard to the agreement of the parties*)

2802-93-R: United Steelworkers of America (Applicant) v. Intertec Security & Investigation Ltd. (Respondent) v. Intercon Security Limited (Intervener)

Unit: "all security guards of Intertec Security & Investigation Ltd. at 2100 Syntex Court in the City of Mississauga, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor" (3 employees in unit) (*Having regard to the agreement of the parties*)

2811-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: "all employees of Modern Building Cleaning Inc. engaged in cleaning and maintenance at Hewlett-Packard (Canada) Ltd., 5150 Spectrum Way, Mississauga, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (10 employees in unit) (*Having regard to the agreement of the parties*)

2821-93-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Marblehead Landing Property Management Inc. (Respondent)

Unit: "all employees of Marblehead Landing Property Management Inc. employed in maintenance, operations and cleaning at 1 and 25 Adelaide Street East, 20 and 44 Victoria Street in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor, office, clerical and sales staff and security employees" (12 employees in unit) (*Having regard to the agreement of the parties*)

2831-93-R: Ontario Public Service Employees Union (Applicant) v. Community Housing Support Service of Toronto Inc. (Respondent)

Unit: "all employees of Community Housing Support Service of Toronto Inc. in the Municipality of Metropolitan Toronto, save and except the Board of Directors" (7 employees in unit) (*Having regard to the agreement of the parties*)

2840-93-R: Ontario Pipe Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Castlemore Mechanical Ltd. (Respondent)

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Castlemore Mechanical Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Castlemore Mechanical Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2847-93-R: Canadian Union of Professional Security-Guards (Applicant) v. Intertec Security & Investigation Ltd. (Respondent)

Unit: "all security guards of Intertec Security & Investigation Ltd. employed in the Municipality of Metropolitan Toronto at the following locations: 940 Lansdowne Avenue, Toronto, 61 Front Street, Toronto, 281 Front Street East, Toronto, 120 Sunrise Avenue, Toronto, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor" (12 employees in unit) (*Having regard to the agreement of the parties*)

2863-93-R: International Association of Machinists and Aerospace Workers (Applicant) v. Metcor Inc. (Respondent)

Unit: "all employees of Metcor Inc. in the Town of Fort Erie, save and except supervisors, persons above the rank of supervisor, office and sales staff" (21 employees in unit) (*Having regard to the agreement of the parties*)

2868-93-R: United Steelworkers of America (Applicant) v. Intertec Security & Investigation Ltd. (Respondent)

Unit: "all security guards of Intertec Security & Investigation Ltd. at 300, 330 and 350 Alton Towers Circle in the City of Scarborough, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor" (6 employees in unit) (*Having regard to the agreement of the parties*)

2875-93-R: Service Employees Union, Local 210 (Applicant) v. 2883 Howard Avenue Inc. (Respondent)

Unit: "all employees of 2883 Howard Avenue Inc. c.o.b. as Towne and Country Motel in the City of Wind-

sor, save and except supervisors, persons above the rank of supervisor, bookkeeper and students employed during the school vacation period” (9 employees in unit) (*Having regard to the agreement of the parties*)

2895-93-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Carleton Condominium Corporation No. 473 c.o.b. as Manoir Gallien (Respondent)

Unit: “all employees of Carleton Condominium Corporation No. 473 c.o.b. as Manoir Gallien in the City of Ottawa, save and except supervisors, persons above the rank of supervisor and clerical staff” (26 employees in unit) (*Having regard to the agreement of the parties*)

2904-93-R: Canadian Security Union (Applicant) v. Ensign Security Services Inc. (Respondent)

Unit: “all security guards of Ensign Security Services Inc. at 2190 Lakeshore Road in the City of Burlington, save and except supervisors and persons above the rank of supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

2905-93-R: Canadian Security Union (Applicant) v. Ensign Security Services Inc. (Respondent)

Unit: “all security guards of Ensign Security Services Inc. at 100 Lakeshore Road East, Oakville, save and except supervisors and persons above the rank of supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

2908-93-R: IWA - Canada (Applicant) v. Modern Building Cleaning Inc. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Modern Building Cleaning Inc. in the Town of Hearst, save and except supervisors and persons above the rank of supervisor” (13 employees in unit) (*Having regard to the agreement of the parties*)

2910-93-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: “all employees of Meadowvale Security Guard Services Inc. employed at 3359 Mississauga Road in the City of Mississauga, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor” (8 employees in unit) (*Having regard to the agreement of the parties*)

2911-93-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Caressant Care Nursing Home of Canada, Limited (Respondent)

Unit: “all employees of Caressant Care Nursing Home of Canada, Limited at its Caressant Care Retirement Home in the Town of Listowel, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office, clerical and maintenance staff” (12 employees in unit) (*Having regard to the agreement of the parties*)

2927-93-R: Communications, Energy & Paperworkers Union of Canada (Applicant) v. 268682 Ontario Limited (Respondent)

Unit: “all employees of G.V.S. Wood Products, a division of 268682 Ontario Limited in the Village of Elmvalle, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and employees in bargaining units for which any trade union held bargaining rights as of November 22, 1993” (23 employees in unit) (*Having regard to the agreement of the parties*)

2954-93-R: International Brotherhood of Electrical Workers Local Union, 636 (Applicant) v. Stoney Creek Hydro-Electric Commission (Respondent)

Unit: “all employees of Stoney Creek Hydro-Electric Commission in the City of Stoney Creek, save and except Supervisors, persons above the rank of Supervisor, Confidential Secretary and Engineers employed in

their professional capacity” (31 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2958-93-R: Canadian Security Union (Applicant) v. Ensign Security Services Inc. (Respondent)

Unit: “all security guards in the employ of Ensign Security Services Inc. at 13-19 Wiltshire Avenue in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

2959-93-R: Canadian Security Union (Applicant) v. Ensign Security Services Inc. (Respondent)

Unit: “all security guards in the employ of Ensign Security Services Inc. at 14 Carlton Street in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

2960-93-R: Canadian Security Union (Applicant) v. Ensign Security Services Inc. (Respondent)

Unit: “all security guards in the employ of Ensign Security Services Inc. at 1011 Wilson Avenue in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

2961-93-R: Canadian Security Union (Applicant) v. Ensign Security Services Inc. (Respondent)

Unit: “all security guards in the employ of Ensign Security Services Inc. at 1170 Martin Grove Road in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (2 employees in unit) (*Having regard to the agreement of the parties*)

2962-93-R: United Steelworkers of America (Applicant) v. Valley Savings (Renfrew County) Credit Union Inc. (Respondent)

Unit: “all employees of Valley Savings (Renfrew County) Credit Union Inc. in the Village of Eganville, save and except Assistant Manager and persons above the rank of Assistant Manager” (5 employees in unit) (*Having regard to the agreement of the parties*)

2967-93-R: Ontario Nurses’ Association (Applicant) v. Victorian Order of Nurses, North Bay Branch (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity by the Victorian Order of Nurses, North Bay Branch, in the City of North Bay, save and except Nurse Managers and persons above the rank of Nurse Manager” (37 employees in unit) (*Having regard to the agreement of the parties*)

2974-93-R: Canadian Union of Public Employees (Applicant) v. Ottawa Roman Catholic Separate School Board (Respondent)

Unit: “all employees of Ottawa Roman Catholic Separate School Board in the City of Ottawa, employed as Adult Basic Literacy/Numeracy Instructors, save and except Vice-Principals, persons above the rank of Vice-Principal and persons in bargaining units for which any trade union held bargaining rights as of November 24, 1993, being the date of application” (2 employees in unit) (*Having regard to the agreement of the parties*)

2975-93-R: Canadian Union of Public Employees (Applicant) v. Anson House Incorporated (Respondent)

Unit: “all employees of Anson House Incorporated in the City of Peterborough, save and except supervisors and persons above the rank of supervisor, registered and graduate nurses and the Confidential Secretary to the Administrator” (26 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2994-93-R: International Union of Bricklayers and Allied Craftsmen Local #4 Ontario (Applicant) v. Fahrmeier Masonry Limited (Respondent)

Unit: “all journeymen and apprentice bricklayers, stonemasons and plasterers and improvers in the employ of Fahrmeier Masonry Ltd., in the industrial, commercial and institutional sector of the construction industry in

the Province of Ontario, and all journeymen and apprentice bricklayers, stonemasons and plasterers and improvers in the employ of Fahrmeyer Masonry Ltd. in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

3001-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Domclean Limited (Respondent)

Unit: "all employees of Domclean Limited at 1925 Dundas Street in the City of London, save and except supervisors and persons above the rank of supervisor" (3 employees in unit) (*Having regard to the agreement of the parties*)

3002-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Double M & M Inc. (Respondent)

Unit: "all employees of Double M & M Inc. at Canada Post Corporation, 951 and 955 Highbury Avenue, in the City of London, save and except non-working forepersons and persons above the rank of non-working foreperson" (13 employees in unit) (*Having regard to the agreement of the parties*)

3016-93-R: Canadian Security Union (Applicant) v. Ensign Security Services Inc. (Respondent) v. Group of employees (Objectors)

Unit: "all security guards in the employ of Ensign Security Services Inc. in the Cities of Fort Erie, Niagara Falls, Port Colborne, St. Catharines, Welland, and the Town of Thorold, save and except supervisors and persons above the rank of supervisor, office and sales staff" (83 employees in unit) (*Having regard to the agreement of the parties*)

3019-93-R: Ontario Public Service Employees Union (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: "all employees of Modern Building Cleaning Inc. engaged in cleaning services at the Ontario Science Centre in the Municipality of Metropolitan Toronto, regularly employed for not more than 24 hours per week, save and except foremen and foreladies, persons above the rank of foreman and forelady, office, clerical, sales staff, and persons for whom any trade union held bargaining rights as of November 25, 1993" (11 employees in unit) (*Having regard to the agreement of the parties*)

3026-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Master Tube Manufacturing (1993) Ltd. (Respondent)

Unit: "all employees of Master Tube Manufacturing (1993) Ltd. in the City of Mississauga, save and except forepersons, persons above the rank of foreperson, office and sales staff" (27 employees in unit) (*Having regard to the agreement of the parties*)

3041-93-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Bourk's Ignition Limited (Respondent)

Unit: "all delivery drivers of Bourk's Ignition Limited in the Regional Municipality of Ottawa-Carleton, save and except dispatchers and persons above the rank of dispatcher" (11 employees in unit) (*Having regard to the agreement of the parties*)

3042-93-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Martino Nursing Centres Limited (Respondent) v. Canadian Union of Public Employees and Its Local 2225-05 (Intervener)

Unit: "all employees of Martino Nursing Centres Limited at its Strathaven Lifecare Centre Retirement Home in the Town of Bowmanville, save and except Assistant Supervisor, persons above the rank of Assistant Supervisor, office and clerical staff, Registered and Graduate Nurses employed in a nursing capacity, students employed during the school vacation period and employees in bargaining units for which any trade union held

bargaining rights as of November 30, 1993" (17 employees in unit) (*Having regard to the agreement of the parties*)

3046-93-R: Canadian Union of Public Employees (Applicant) v. Laidlaw Waste Management Systems Ltd. (Recycling Depot) (Respondent)

Unit: "all employees of Laidlaw Waste Management Systems Ltd. (Recycling Depot) at its Recycling Depot in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office, clerical, sales staff, and any persons for whom any trade union held bargaining rights as of November 30, 1993" (12 employees in unit) (*Having regard to the agreement of the parties*)

3082-93-R: Canadian Union of Public Employees (Applicant) v. Ontario Hydro (Respondent)

Unit: "all security guards of Ontario Hydro employed at the Saunders Hydroelectric G.S. in the City of Cornwall, save and except supervisors, persons above the rank of supervisor and persons for whom any trade union held bargaining rights as of December 2, 1993" (5 employees in unit) (*Having regard to the agreement of the parties*)

3099-93-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: "all employees of Meadowvale Security Guard Services Inc. employed at 70 York Street in the Municipality of Metropolitan Toronto, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*)

3101-93-R: Ontario Nurses' Association (Applicant) v. Beacon Hill Lodge Inc. (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by Beacon Hill Lodge Inc. in the Town of Newmarket, save and except the Director of Nursing, persons above the rank of Director of Nursing and employees in bargaining units for which any trade union held bargaining rights as of December 3, 1993" (8 employees in unit) (*Having regard to the agreement of the parties*)

3108-93-R: Office and Professional Employees International Union (Applicant) v. NEE-GI-NAN Inc. (Respondent)

Unit: "all employees of the NEE-GI-NAN Inc. in the Town of Cochrane, save and except the Program Co-ordinators, persons above the rank of Program Co-ordinator and the bookkeeper/secretary" (14 employees in unit) (*Having regard to the agreement of the parties*)

3164-93-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Buttcon Limited (Respondent)

Unit: "all carpenters and carpenters' apprentices, in the employ of Buttcon Limited in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3261-93-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: "all employees of Meadowvale Security Guard Services Inc. employed at 245-255 Donway West in the Municipality of Metropolitan Toronto, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor" (2 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2502-93-R: Canadian Union of Public Employees (Applicant) v. The Regional Municipality of Halton (Respondent)

Unit: "all employees of The Regional Municipality of Halton, in its Income Maintenance and Administrative Services Divisions of the Social Services Department, save and except Supervisors, persons above the rank of Supervisor, Secretary to the Director of Income Maintenance and the Secretary to the Manager of Administrative Services" (54 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	61
Number of persons who cast ballots	61
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	59
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	31
Number of ballots marked against applicant	30

2609-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Modern Windows V.H. Inc. (Respondent) v. Syndicat Des Employés De Modern Window (Intervener)

Unit: "tous les employés de l'usine à Hawksbury à l'exception des employés du bureau." (16 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	1
Number of ballots marked in favour of intervener	3

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1987-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Barnes Security Services Limited c.o.b. as Metropol Security (Respondent)

Unit: "all security guards employed by Barnes Security Services Limited c.o.b. as Metropol Security in the City of Belleville, save and except site supervisors and persons above the rank of site supervisor, dispatchers, office, clerical and sales staff, students employed during the school vacation period, persons employed at the Proctor and Gamble work location and persons in bargaining units for whom any trade union held bargaining rights as of September 16, 1993" (44 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	44
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	28
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	10

2700-93-R: Canadian Union of Public Employees (Applicant) v. Women's College Hospital (Respondent)

Unit: "all employees of Women's College Hospital in the Municipality of Metropolitan Toronto, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors and forepersons, persons above the rank of supervisor and foreperson; professional medical staff, registered, graduate and undergraduate nursing staff; paramedical staff; office and clerical staff; security guards; biomedical technicians; and those employees for whom a union held bargaining rights on the date of application" (94 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	165
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Number of persons who cast ballots	33
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	31
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

Applications for Certification Dismissed Without Vote

1126-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Dualex Enterprises Inc. (Respondent) (104 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1822-93-R: United Steelworkers of America (Applicant) v. Alros Products Limited c.o.b. Polytarp Products (Respondent)

Unit #1: "all employees of Alros Products Limited c.o.b. as Polytarp Products at 350 Wildcat Road, in the Regional Municipality of Metropolitan Toronto, save and except assistant production manager/production manager, persons above the rank of assistant production manager/production manager, the manager of quality control and employee relations, office, clerical, sales staff and students employed during the school vacation period" (88 employees in unit)

Number of names of persons on revised voters' list	88
Number of persons who cast ballots	90
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	35
Number of ballots marked against applicant	40
Number of ballots segregated and not counted	15

2522-93-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. The O'Keefe Centre for the Performing Arts (Respondent) v. The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local No. B-173, Canadian Union of Public Employees (Intervenors)

Unit #1: "all its employees employed in the City of Toronto, save and except department heads or managers and those above the rank of department head or manager, office and clerical staff, stage door personnel and employees covered by subsisting collective agreements" (91 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	91
Number of persons who cast ballots	59
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	59
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	21
Number of ballots marked in favour of intervener	36

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2417-93-R: Communications, Energy and Paperworkers Union of Canada, CLC (Applicant) v. Towne Cartage Ltd. (Respondent)

Unit: "all employees of Towne Cartage Ltd. in the City of Brockville and the Town of Prescott save and except foreman, persons above the rank of foreman, and office and clerical staff" (44 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	43
Number of persons who cast ballots	43
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	38
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	25
Number of ballots segregated and not counted	4

Applications for Certification Withdrawn

2436-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Miller Paving Limited, Brennan Paving & Construction Ltd., E.C. King Contracting (Respondents)

2841-93-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

2843-93-R: Service Employees Union, Local 663 (Applicant) v. Lennox and Addington Resources for Children (Respondent)

2951-93-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Price Club (Respondent) v. Group of Employees (Objectors)

3007-93-R; 3008-93-R: International Union Of Operating Engineers, Local 793 (Applicant) v. Hard Rock Paving Company Limited (Respondent)

3013-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America (Applicant) v. Servacar Limited (Respondent)

3039-93-R: United Steelworkers of America (Applicant) v. North American Security Services (Respondent)

3051-93-R: Labourers' International Union of North America, Local 597 (Applicant) v. Sheaffer-Townsend Mechanical-Electrical Ltd. & Canron Inc. (A Joint Venture) (Respondents)

3080-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Hard Rock Paving Company Limited (Respondent) v. Canadian Brotherhood of Railway, Transport and General Workers (Intervener)

3134-93-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. JDR Tools & Equipment, Div. of 810332 Ontario Inc. (Respondent)

3227-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America (Applicant) v. Servacar Limited c.o.b. as Esso Petroleum Canada (Respondent)

3249-93-R: Canadian Security Union (Applicant) v. Wackenhut of Canada Limited (Respondent)

3310-93-R: United Food & Commercial Workers International Union, AFL, CIO, CLC (Applicant) v. Highland Packers Limited (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

2963-93-R: United Steelworkers of America (Applicant) v. Valley Savings (Renfrew County) Credit Union Inc. (Respondent) (*Granted*)

2991-93-R: Lennox and Addington Resources for Children (Applicant) v. Service Employees Union, Local 663 (Respondent) (*Withdrawn*)

3009-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Hard Rock Paving Company Limited (Respondent) (*Withdrawn*)

3022-93-R: Ontario Public Service Employees Union (Applicant) v. Modern Building Cleaning Inc. (Respondent) (*Granted*)

3081-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Hard Rock Paving Company Limited (Respondent) (*Withdrawn*)

FIRST AGREEMENT - DIRECTION

3112-93-FC: P.C. World Canada Limited (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union (CAW-Canada), Local 124, (Employees in the Municipality of Metropolitan Toronto) (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3782-92-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. M & AL Roofing Ltd. and/or Les Toitures M & AL Canada Ltee./M & AL Roofing Canada Ltd. and/or Ron Robinson Roofing Inc./Les Toitures Ron Robinson Inc. (Respondents) (*Granted*)

2238-93-R: United Brotherhood of Carpenters and Joiners of America, Local 249 (Applicant) v. Crystaplex Plastics Ltd. and Laird Plastics (Canada) Inc. (Respondent) (*Granted*)

2449-93-R: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Marathon Drywall Ltd. and Caledon Drywall Ltd. (Respondents) (*Granted*)

2573-93-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Joe Bancheri carrying on business under the firm name and style of A.C. Joe Bancheri Carpentry; and Exclusive Carpentry Enterprises Limited (Respondents) (*Granted*)

2728-93-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Calvano Lumber & Trim Co. Ltd., Cerveira Trimming Co. Ltd., Devon Builders Hardware Ltd. (Respondents) (*Granted*)

2746-93-R: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Redan Dry Wall Inc. and Keyon Dry Wall Inc. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

2199-92-R: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Armor Masonry and Precast Limited and Classic Masonry Inc. and 957891 Ontario Inc. (Trind-Co Rental) and 981459 Ontario Limited and Fern-Co Inc. and Tandem Electrical Inc. (Respondents) (*Withdrawn*)

2200-92-R: Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Local 1081 and Labourers' International Union of North America, Ontario Provincial District Council (Applicants) v. Armor Masonry and Precast Limited and Classic Masonry Inc. and 957891 Ontario Inc. and 981459 Ontario Limited and Fern-Co Inc. and Tandem Electrical Inc. (Respondents) (*Withdrawn*)

3782-92-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. M & AL Roofing Ltd. and/or Les Toitures M & AL Canada Ltee./M & AL Roofing Canada Ltd. and/or Ron Robinson Roofing Inc./Les Toitures Ron Robinson Inc. (Respondents) (*Granted*)

1371-93-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Canadian Pacific Hotels Corporation (Respondent) (*Granted*)

2238-93-R: United Brotherhood of Carpenters and Joiners of America, Local 249 (Applicant) v. Crystaplex Plastics Ltd. and Laird Plastics (Canada) Inc. (Respondent) (*Granted*)

2449-93-R: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Marathon Drywall Ltd. and Caledon Drywall Ltd. (Respondents) (*Granted*)

2573-93-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Joe Bancheri carrying on business under the firm name and style of A.C. Joe Bancheri Carpentry; and Exclusive Carpentry Enterprises Limited (Respondents) (*Granted*)

2728-93-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Calvano Lumber & Trim Co. Ltd., Cerveira Trimming Co. Ltd. and Devon Builders Hardware Ltd. (Respondents) (*Granted*)

2746-93-R: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Redan Dry Wall Inc. and Keyon Dry Wall Inc. (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

2585-93-R: Ottawa-Carleton Public Employees Union, Local 503 (Applicant) v. Ottawa Public Library (Respondent) (*Withdrawn*)

Section 64.2 - SUCCESSOR RIGHTS/CONTRACT SERVICES

3255-93-R: Canadian Union of Professional Security-Guards (Applicant) v. Ontario Guard Services Inc., Northwest Protection Services Ltd. and Metro Toronto Condominium Corporation No. 619 (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2132-93-R: Monica Kunow (Applicant) v. International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees' and Bartenders' Union, AFL-CIO-CLC (Respondent) v. 445204 Ontario Limited c.o.b. as Queensbury Arms Hotel (Intervener)

Unit: "all part-time and full-time bartenders, waiters, busboys, door persons and coat check staff employed at Queensbury Arms, 1212 Weston Road, Weston, Ontario, save and except managers and persons above the rank of manager" (11 employees in unit) (*Dismissed*)

2430-93-R: Bill Johnson (Applicant) v. United Food and Commercial Workers International Union, Local 633 (Respondent) v. Barton Feeders Company Limited (Intervener)

Unit: "all employees of Barton Feeders Company Limited in Owen Sound, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff, and persons regularly employed for not more than 24 hours per week" (9 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	9

2433-93-R: Blake Justice and Shawn Freer (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (Respondent) v. Kuriyama Canada Inc. (Intervener)

Unit: "all employees of Kuriyama Canada Inc. in Brantford, save and except team leaders, persons above the rank of team leader, sales and office staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period" (28 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	27
Number of ballots marked in favour of respondent	6
Number of ballots marked against respondent	21

2626-93-R: Shelly Gagnon (Applicant) v. United Textile Workers of America Local 369 (Respondent) v. Sonatex Laminating Canada Inc. (Intervener)

Unit: "all employees employed by Sonatex Laminating Canada Inc. at its plant at 498 Seaman Street, Stoney Creek, save and except foremen, foreladies, persons above the rank of foreman, forelady and office staff and persons regularly employed for not more than 24 hours per week" (9 employees in unit) (*Dismissed*)

Number of names of persons on revised voters' list	14
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of ballots marked in favour of respondent	7
Number of ballots marked against respondent	7

2708-93-R: Mr. Clarence Crough, Mr. Frank Pileggi (Applicants) v. Laundry & Linen Drivers and Industrial Workers - Local 847 (Respondent) v. Talley Canada Ltd. c.o.b. as Diversified Stainless Steel of Canada (Intervener)

Unit: "all of the warehouse employees at Talley Canada Ltd. c.o.b. as Diversified Stainless Steel of Canada at 98 Norfinch Drive, Downsview, save and except foremen and persons above the rank of foreman" (2 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2

2979-93-R: 954633 Ontario Inc. c.o.b. M & S Plumbing (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (Respondent) (*Dismissed*)

3020-93-R: Sukhinder Sandhu (Applicant) v. C.A.W. Local 1459 & Chrysler Canada (Respondents) (*Dismissed*)

3114-93-R: Robert Gentles (Applicant) v. United Food & Commercial Workers International Union Local 633 (Respondent) v. Twin Food Mart Limited (Intervener) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

3123-93-U: Slater Steels Hamilton Specialty Bar, a Division of Slater Industries Inc. (Applicant) v. United Steelworkers of America, Local 4752 (Respondent) (*Withdrawn*)

3234-93-U: Slater Steels Hamilton Specialty Bar, a Division of Slater Industries Inc. (Applicant) v. United Steelworkers of America Local 4752, and those parties set out on Appendix F (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

3338-93-U: Melrose Homes Inc. (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 and Vince McNeil (Respondent) (*Withdrawn*)

APPLICATIONS CONCERNING REPLACEMENT WORKERS

2036-93-U: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 357 (Applicant) v. Famous Players Inc. (Respondent) (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3066-90-U; 2620-91-U; 2277-92-U: Vernon W. Yorgason (Applicant) v. York University Faculty Association (Respondent) v. York University (Intervener) (*Withdrawn*)

2866-91-U: Ontario Public Service Employees Union, Aarne Hannikainen (Applicants) v. Northern College of Applied Arts and Technology (Respondent) (*Withdrawn*)

0877-92-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Dualex Enterprises Inc. (Respondent) (*Dismissed*)

1740-92-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Luis Trindade, Mary Trindade, Jose Fernandes, Horatio Carreira, Francisco Ferreira and Eugene Fernandes (Respondents) (*Terminated*)

1741-92-U: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Luis Trindade, Mary Trindade, Jose Fernandes, Horatio Carreira, Francisco Ferreira and Eugene Fernandes (Respondents) (*Terminated*)

2159-92-U: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America - U.A.W. (Applicant) v. Morrison's Meat Packers Ltd. (Respondent) (*Granted*)

2198-92-U: Labourers' International Union of North America, Local 1059 and Labourers' International Union of North America, Local 1081 and Labourers' International Union of North America - Ontario Provincial District Council (Applicant) v. Armor Masonry and Precast Limited and Classic Masonry Inc. and 957891 Ontario Inc. and 981459 Ontario Limited and Fern-Co Inc. and Tandem Electrical Inc. (Respondents) (*Terminated*)

2203-92-U: International Union of Bricklayers and Allied Craftsmen Local 5 (Applicant) v. Armor Masonry and Precast Ltd. and Classic Masonry Inc. and 957891 Ontario Inc. (Trind-Co Rental) and 981459 Ontario Limited and Fern-Co Inc. and Tandem Electrical Inc. (Respondents) (*Withdrawn*)

3400-92-U: Anwar Chaudri (Applicant) v. Canadian Union of Public Employees/Ontario Hydro Employees' Union, Local 1000 (Respondent) v. Ontario Hydro (Intervener) (*Dismissed*)

3527-92-U: William A Curtis (Applicant) v. The Communications, Energy & Paperworkers Union of Canada, The Canadian Paperworkers Union (Respondent) (*Dismissed*)

3582-92-U; 3619-92-U: Stan Andrews (Applicant) v. United Steelworkers of America, Local 2868 (Respondent) v. J.I. Case Company (Intervener); Steven Lenkey, Robert Morris and Kevin Simoneau (Applicants) v. United Steelworkers of America, Local 2868 (Respondent) v. J.I. Case Company (Intervener) (*Dismissed*)

3840-92-U: Angello Malamas (Applicant) v. Union Local 75, Chestnut Park Hotel (Respondents) (*Terminated*)

0014-93-U: Susan Forbes (Applicant) v. The Simcoe County Roman Catholic Separate School Custodians (Respondent) v. The Simcoe County Roman Catholic Separate School Board (Intervener) (*Dismissed*)

0082-93-U; 0514-93-U; 1341-93-U; 2956-93-U: Angelo Malamas (Applicant) v. Hotel Employees Restaurant Employees Union Local 75 (Respondent) v. Chestnut Park Hotel (Intervener); Angelo Malamas (Applicant) v. Union Local 75, Chestnut Park Hotel (Respondents); Angelo Malamas (Applicant) v. Union Local 75 and International Union, Chestnut Park Hotel (Respondents); Angelo Malamas (Applicant) v. Jack Fournier Sam Samaroo (Respondent) (*Terminated*)

0869-93-U: United Food and Commercial Workers' International Union, AFL-CIO Local 999 (previously Local 114P) (Applicant) v. Maple Leaf Foods Inc. (Respondent) (*Withdrawn*)

1415-93-U: Orlando Morales, Angello Malamas, Farhad Sarafan (Applicants) v. Union Local 75, Clayton Long (Respondent) v. Chestnut Park Hotel (Intervener) (*Dismissed*)

1671-93-U: Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. Matthews The Lumber People (Respondent) (*Granted*)

1674-93-U: London and District Construction Association and Labour Relations Bureau of the Ontario General Contractors Association (Applicant) v. Labourers' International Union of North America, Local 1059 (Respondent) v. Concrete Forming (1980) Limited, Rockwell Concrete Forming (London) Limited, Walloy Materials Limited, Forest City Forming Ltd., Lider General Construction Ltd., O.S. Concrete Forming Inc., Co-Fo Concrete Forming Limited (Interveners) (*Dismissed*)

1922-93-U: Laundry and Linen Drivers and Industrial Workers Union, Local 847 (Applicant) v. CMP Group (1985) Ltd. (Respondent) (*Granted*)

1986-93-U: International Union, United Plant Guard Workers of America, Local 1956 (Applicant) v. Scott D. Avery (Company) Limited (Respondent) (*Granted*)

2009-93-U: Carlos Fernandez (Applicant) v. United Food and Commercial Workers International Union, Region 18, AFL, CIO, CLC, on behalf of its Local 617P (Respondent) (*Dismissed*)

2137-93-U; 2138-93-U; 2139-93-U; 2140-93-U; 2141-93-U; 2142-93-U: Robert P. Morissette (Applicant) v. L'Union canadienne des employés de syndicat (U.C.E.S.) (Respondent); Robert P. Morissette (Applicant) v. L'Alliance de la fonction publique du Canada (A.F.P.C.) (Respondent); Marlène Boulet (Applicant) v. L'Union canadienne des employés de syndicat (U.C.E.S.) (Respondent); Roger Vaillancourt (Applicant) v. L'Alliance de la fonction publique du Canada (Respondent); Marlène Boulet (Applicant) v. L'Alliance de la fonction publique du Canada (Respondent); Roger Vaillancourt (Applicant) v. L'Union canadienne des employés de syndicat (U.C.E.S.) (Respondent) (*Terminated*)

2380-93-U; 2747-93-U: Ontario Public Service Employees Union (Applicant) v. Pioneer Youth Services (Toronto) Inc. (Respondent); Ontario Public Service Employees Union (Applicant) v. Pioneer Youth Service (Toronto) Inc. (Respondent) (*Withdrawn*)

2446-93-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Applicant) v. Tatro Equipment Sales Ltd. (Respondent) (*Granted*)

2559-93-U: Ontario Public Service Employees Union (Applicant) v. St. Joseph's Hospital (Hamilton) (Respondent) (*Withdrawn*)

2650-93-U: Al Baker (Applicant) v. Design Craft and Geo Dixon - Local 506 L.I.U.N.A. (Respondents) (*Withdrawn*)

2755-93-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada and its Local 124 (Applicant) v. P.C. World Canada Limited (Respondent) (*Withdrawn*)

2774-93-U: Canadian Union of Public Employees, Local 3009 (Applicant) v. Christian & Missionary Alliance Eastern and Central Canadian District operating as Cama Woodlands (Respondent) (*Withdrawn*)

2828-93-U: Canadian Union of Public Employees and its Local 229 (Applicant) v. Marriott Food and Services Management (Respondent) (*Withdrawn*)

2829-93-U: Canadian Union of Public Employees and its Local 229 (Applicant) v. Marriott Food and Services Management (Respondent) (*Withdrawn*)

2830-93-U: Fernand Pepin (Applicant) v. Amalgamated Transit Union Local 1374, Greyhound Lines of Canada (Respondents) (*Withdrawn*)

2834-93-U: United Steelworkers of America (Applicant) v. J.C.V.R. Packaging Inc. (Respondent) (*Granted*)

2880-93-U: OPSEU Local 707 (Applicant) v. Lakehead Regional Family Centre (Respondent) (*Withdrawn*)

2881-93-U: Ontario Nurses' Association (Applicant) v. County of Huron (Huronview Home for the Aged, Clinton and Huronlea Home for the Aged, Brussels) (Respondent) (*Withdrawn*)

2893-93-U: Canadian Union of Public Employees, Local 3689 (Applicant) v. Ottawa Roman Catholic Separate School Board (Respondent) (*Withdrawn*)

2899-93-U: Paul Formosa (Applicant) v. General Motors of Canada Limited and CAW, Local 222 (Respondents) (*Dismissed*)

2900-93-U: Hospitality and Service Trades Union, Local 261 (Applicant) v. 160572 Canada Inc. (c.o.b. Allpark Parking) (Respondent) (*Withdrawn*)

2906-93-U: Steven Parisien et al (Applicant) v. International Ladies Garment Workers Union, Thomas Steers, Assistant Director of Organization Canada, Union Executive: Angelo Sanseverino, Richard Cadieux, Lawrence O'Byrne (Respondent) (*Withdrawn*)

2919-93-U: United Steelworkers of America (Applicant) v. North American Security Services and Canadian Union of Professional Security-Guards (Respondents) (*Withdrawn*)

2924-93-U: Paul Valiquette (Applicant) v. Harvey's #264 Eggarhas Investments Ltd. (Respondent) (*Withdrawn*)

2925-93-U: Robert W. Foreman (Applicant) v. CAW Local 222 CAW/TCA National Union (Respondent) (*Withdrawn*)

2971-93-U: Brewery, General and Professional Workers' Union (Applicant) v. BevPac Beverages Ltd. (Respondent) (*Withdrawn*)

2992-93-U: Canadian Union of Professional Security-Guards (Applicant) v. North American Security Services (Respondent) (*Withdrawn*)

3017-93-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada and its Local 124 (Applicant) v. P.C. World Canada Limited (Respondent) (*Withdrawn*)

3018-93-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada and its Local 124 (Applicant) v. P.C. World Canada Limited (Respondent) (*Withdrawn*)

3032-93-U: Etelka or Ethel Fehervari (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Scarborough General Hospital (Intervener) (*Withdrawn*)

3038-93-U: Joseph Michael Smith (Applicant) v. International Brotherhood of Teamsters Local No. 230 (Respondent) (*Withdrawn*)

3047-93-U: Brewery, General and Professional Workers Union (Applicants) v. Bevpac Beverages Ltd. (Respondent) (*Withdrawn*)

3050-93-U: Valerie St. Louis (Applicant) v. Xerox Canada (Respondent) (*Dismissed*)

3145-93-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Leonard's Building Maintenance Ltd. (Respondent) (*Withdrawn*)

3163-93-U: Labourers' International Union of North America, Local 183 (Applicant) v. Northclife Holdings Limited/W-A Construction Company Limited (Respondent) (*Withdrawn*)

3173-93-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. 268682 Ontario Ltd. (GVS Wood Products) (Respondent) (*Withdrawn*)

3204-93-U: United Steelworkers of America (Applicant) v. Royalguard Vinyl Co., A Division of Royplast Limited (Respondent) (*Withdrawn*)

3219-93-U: Catherine E. Austin, Canadian Auto Workers Local 88 (Applicants) v. CAMI Automotive (Respondent) (*Dismissed*)

3220-93-U: Nancy Bishop (Applicant) v. Ontario Liquor Board Employees' Union (Respondent) (*Dismissed*)

3252-93-U: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 357 (Applicant) v. Famous Players Inc. (Respondent) (*Granted*)

3256-93-U: Canadian Union of Professional Security-Guards (Applicant) v. Ontario Guard Services Inc., Northwest Protection Services Ltd. and Metro Toronto Condominium Corporation No. 619 (Respondents) (*Granted*)

3282-93-U: Teamsters, Local Union No. 879 (Applicant) v. Seaway News Company Limited (Respondent) (*Withdrawn*)

3313-93-U: Alexander Noel (Applicant) v. CAW, GM (Respondents) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

2844-93-M: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Locals 414, 422, 440, 448, 461, 483, 488, 1000 and 1688 (Applicants) v. Retail Wholesale and Department Store Union District Council of the United Food and Commercial Workers Union, et al; The Great Atlantic & Pacific (stores) Company of Canada Ltd.; Able Atlantic Taxi; Associated Toronto Taxi-cab Co-operative Ltd.; Atlantic Packaging Products Ltd.; The Great Atlantic & Pacific Company of Canada Ltd.; Sav-A-Centre - division of the Great Atlantic & Pacific Company of Canada; Autostock Distribution Division of T.C.C. International Inc.; Beaver Foods Ltd.; Beaver Lumber Company Ltd.; Beaver Lumber Company (Parkdale Store); CAA Ottawa; Canada Catering Co. Ltd.; Canteen of Canada Ltd.; Can Can Food & Vending Services Ltd. (Parnell); Can Can Food & Vending Services (Essex); Central Chevrolet Oldsmobile (London) Inc.; 947465 Ontario Ltd. c.o.b. as Checkers Limosine & Airport Service; Colonial Furniture (Ottawa) Ltd.; 978653 Ontario Inc. c.o.b. as The Connection Group; Cornwall Warehousing Limited; Dougherty's Meats Limited; Dynamic Distributors, A Division of Apple Auto Glass Limited; 629434 Ontario Ltd. (East Huron Poultry Ltd.); Educator Supplies & Scholars Choice; Factory Carpet - Division of Colorcarpet Inc.; G.B. Catering Ltd.; Grand & Toy Ltd.; Hershey Canada Inc.; Hully Gully (London) Ltd.; IGA Glebe; Jarvis

Design & Display; J.F. Eastwood; K-W Food Services; Laidlaw Carriers Inc.; Shirley Leishman Books Ltd.; Loeb Alfred; 917921 Ontario Inc. c.o.b. as Loeb Baywood; 914089 Ontario Inc. operating under Loeb I.G.A. Beaverbrook; 836541 Ontario Ltd. c.o.b. as Loeb Carleton Place; Capital Supermarkets (1988) Ltd. c.o.b. Loeb IGA Convent Glen; 652605 Ontario Inc. c.o.b. as Loeb Lincoln Heights; Loeb IGA Nortown; Loeb IGA Wallaceburg; 895657 South Mitchell Holdings Ltd. c.o.b. as Loeb Club Plus Woodstock; L.O.F. Glass of Canada Limited; Marsh Food Services; Mr. Grocer Franchise Stores; Murphy Distributing Ltd.; National Federation of Nurses' Union; National Grocers Co. Ltd.; Nivel Inc.; No Frills Franchise Stores; Nordik Windows Inc.; Nutritional Management Services (1991) Limited; Ontario Motor League Elgin-Norfolk Club and Ontario Motor League World Wide Travel Agency (St. Thomas) Limited; Patton's Place Ltd.; Pharma Plus Drugmarts Ltd.; Robert Chabot Enterprises Limited c.o.b. Centennial Construction Equipment Rentals; Robert Yan Drugs Ltd.; Royal Doulton Canada Limited; Katalin Lanczi Pharmacy Ltd. c.o.b. as Shoppers Drug Mart; Sifton Properties Limited; Stuart House Products; S&R Department Store (1976) Ltd.; Trafalgar I.G.A.; Somerset Specialities Ltd.; Trans-Canada Freezers Limited; The UCS Group Division of IMASCO Retail Inc.; United Co-operatives of Ontario; Vanfax Corporation (LOF) Glass of Canada Ltd.); Versa Services Ltd.; VS Services Ltd.; Walfoods Limited; 598537 Ontario Inc. c.o.b. as Warner Pro Hardware; Wayne Pitman Ford Sales Inc.; Willett Foods Inc.; F.W. Woolworth Co. Ltd.; World's Biggest Book Store, a division of Coles Book Stores Limited; The Brick Warehouse Corporation; 374761 Ontario Limited c.o.b. under the Firm name and style of Brotherhood Mens & Boys Department Store; Freed Storage Limited; Sears Canada Inc.; Simpsons (The Bay Brampton); Simpsons (The Bay Cedarbrae); The Bay - Kingston; The Hudson's Bay Company, Kitchener; The Bay (Windsor); Simpsons Ltd. (The Bay - Sherway Gardens); Simpsons (The Bay - Warden Woods); Seligman and Latz of Polo Park Limited; Zellers Inc. (Metropolitan Toronto and Brampton Distribution Centres); 806966 Ontario Inc. as A-1 Taxi; 727825 Ontario Ltd. c.o.b. as Eastway Taxi, Julian Taxi Cab Ltd.; ABC Taxi (Brockville) Ltd. & Safedrive Inc. c.o.b. City Cab; Associated Toronto Taxi-Cab Limited; Blue Line Taxi Co. Limited; Call-A-Cab Ltd.; 366838 Ontario Limited c.o.b. as City Wide Taxi; Diamond Taxicab Association (Toronto) Limited; Hamilton Yellow Cab Company Limited; Metro Cab Company Limited; DJ's Nepean Taxi Company Limited and the Owners Group; Union Taxi; Westway Taxi Nepean Ltd.; Bluecrest (Div. of Ault Foods) Royal Oak Dairy (A Division of Ault Foods); Abbot Laboratories Limited; Ault Foods Limited; Baskin-Robins, A Division of Silcorp Limited; Beatrice Foods (Brampton Div.); Beatrice Foods Inc. Toronto Div.; Beatrice Foods Inc., Simcoe Division; Beatrice Foods Inc., Brookside Dairy Division; Beatrice Foods Inc., Maple Lane Dairy Division; Belarus Equipment of Canada Ltd.; Brown Fine Foods; Everfresh Beverages Inc.; Gesco Warehousing & Distributing Company; Mossman's Appliance Parts Ltd.; Northside Dairy (Division of Ault Foods); Restaunomics Service; Rich Products of Canada Ltd.; Silcorp Ltd.; Seibe North Canada Ltd.; Sodexho Ltd.; Spalding Canada - a Division of Spalding & Evenflo Canada Inc.; TCC Bottling Ltd. (Renfrew) c.o.b. as Coca Cola Bottling; T.R.S. Food Services Ltd.; Uniondale Cheese Factory Inc.; Winchester Cheese, Winchester; Hydon Holdings Limited c.o.b. Hy's Steak House; The Kitchener-Waterloo Labour Association Incorporated; The Millcroft Inn Limited; National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, CAW-Canada Local 27; Local 1520 C.A.W. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, (CAW-Canada); Rendez Vous Tavern; Sirch Holdings Inc. c.o.b. as The Ridout Tavern Complex; Wendy's Restaurants of Canada Inc. Store #356; 696254 Ontario Limited c.o.b. as Notes - Alfies; Canada Bread, Division of Corporation Food Limited (Oshawa, Hamilton and St. Catharines branches); Commercial Bakeries Corp.; Corporate Foods Limited, Dempster's Bread in the City of Markham; Corporate Foods Limited; Culinar Foods Inc.; Robinson Cone (a Division of Dover Industries); Golden Mill Bakery Limited; Hostess Food Products Limited, Cambridge; Hostess Frito Lay Company, London; Humpty Dumpty Foods Limited; Kitchens of Sara Lee, Canada, a division of Sara Lee Corporation of Canada Limited; Weston Bakeries Limited, Peterborough; Weston Bakeries Limited, Kitchener; Weston Bakeries Limited, London; Weston Bakeries Limited, Orillia; Weston Bakeries Limited, Walkerton; Best Foods Canada Inc.; Casco Inc., Nestle Canada Inc. Foods Division (Respondents) v. Minister of Labour, Ontario Retail Employees Dental Benefit Trust Fund (Intervenors) v. Group of Employees (Intervenors) (*Granted*)

2869-93-M: RWDSU District Council of the United Food & Commercial Workers International Union and Its Locals 414, 440 and 1000 (Applicants) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America and its Locals 414, 440, 1000 and 1688, Murphy Distributing Ltd. and/or Murphy Distributing (Sarnia) Ltd., Everfresh Beverages Inc., Marsh Food Services, 947465 Ontario Limited

c.o.b. as Checker Limousine and Airport Service, The Hudson's Bay Company - Kitchener, the Hudson's Bay Company - Windsor, K-W Food Services, Willett Foods Inc. (Respondents) (*Dismissed*)

2882-93-M: Ontario Nurses' Association (Applicant) v. County of Huron (Huronview Home for the Aged, Clinton and Huronlea Home for the Aged, Brussels) (Respondent) (*Withdrawn*)

2987-93-M: Ontario Liquor Boards Employees' Union (Applicant) v. Fort Erie Duty Free Shoppe Inc. (Respondent) (*Granted*)

3005-93-M: United Brotherhood of Carpenters and Joiners of America, Local 1072 (Applicant) v. Ontario Store Fixtures Inc. (Respondent) (*Granted*)

3122-93-M: P.C. World Canada Limited (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union (CAW-Canada) Local 124 (Employees in the Municipality of Metropolitan Toronto) (Respondent) (*Withdrawn*)

3169-93-M: Service Employees Union, Local 210 (Applicant) v. Maisonville Court Inc. (Respondent) (*Withdrawn*)

3205-93-M: United Steelworkers of America (Applicant) v. Royalguard Vinyl Co., a Division of Royplast Limited (Respondent) (*Granted*)

3247-93-M: Communications, Energy and Paperworkers Union of Canada (Applicant) v. 268863 Ontario Ltd. (GVS Wood Products) (Respondent) (*Withdrawn*)

3271-93-M: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Mico Inc. c.o.b. as Loeb Club Plus - Westminster (Respondent) (*Granted*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

3012-93-M: Richard Babbitt (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America U.A.W. Local 251 and Solvay Automotive Canada, Inc. (Respondents) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

3024-93-M: Glove Reconditioners, a division of Canadian Linen Supply Co. Ltd. (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

JURISDICTIONAL DISPUTES

3814-92-JD: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local Union 1036 (Applicant) v. Nicholls Radtke Limited, United Brotherhood of Carpenters and Joiners of America, Local 446 (Respondents) (*Dismissed*)

1672-93-JD: Ironworkers' District Council of Ontario and the International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. The State Group Limited, State Contractors Inc., Millwrights District Council of Ontario, Millwrights Local 1244, United Brotherhood of Carpenters and Joiners of America, Ontario Erectors Association Incorporated, Association of Millwrighting Contractors of Ontario (Respondents) (*Granted*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2748-93-OH: Terry Benoit and Ontario Public Service Employees Union (Applicant) v. Pioneer Youth Service (Toronto) Inc. (Respondent) (*Withdrawn*)

2926-93-OH: Robert St. Jean (Applicant) v. Pat Thompson, Inco Limited Superintendent, (Respondent) (*Withdrawn*)

2970-93-OH: Maria Piotrowska (Applicant) v. George Fras (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

1788-92-G: Sheet Metal Workers' International Association, Local 473 (Applicant) v. The Electrical Power Systems Construction Association, Bruce Nuclear Power Development (Respondents) (*Dismissed*)

2602-92-G; 2603-92-G: Drywall Acoustic Lathing and Insulation, Local 675 (Applicant) v. No Name Interior Systems (Respondent) (*Granted*)

2604-92-G; 2605-92-G: Drywall Acoustic Lathing and Insulation, Local 675 (Applicant) v. Maxan Drywall Ltd. (Respondent) (*Granted*)

0862-93-G: United Brotherhood of Carpenters and Joiners of America Local 249 (Applicant) v. Crystaplex Plastics Ltd. (Respondent) (*Granted*)

1017-93-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Bradsil Limited (Respondent) (*Granted*)

1414-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Birnie Electric Ltd. (Respondent) (*Granted*)

1513-93-G: Labourers' International Union of North America Labourers' International Union of North America Local 1059 (Applicant) v. Banister Pipeline and Pipe Line Contractors Association of Canada (Respondents) (*Granted*)

1683-93-G: Labourers' International Union of North America, Local 607 (Applicant) v. Arosan Enterprises Ltd. (Respondent) (*Granted*)

1946-93-G: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Good Knight Masonry Ltd. (Respondent) (*Granted*)

2004-93-G: International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Keyon Dry Wall Inc. formerly Redan Drywall Inc. (Respondent) (*Withdrawn*)

2091-93-G: Labourers' International Union of North America, Local 1081 (Applicant) v. Normbau, 2000 International Inc. (Respondent) (*Withdrawn*)

2448-93-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Caledon Drywall Ltd. and Marathon Drywall Ltd. (Respondents) (*Granted*)

2572-93-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Joe Bancheri carrying on business under the firm name and style of A.C. Joe Bancheri Carpentry; and Exclusive Carpentry Enterprises Limited (Respondents) (*Granted*)

2598-93-G: Quality Control Council of Canada (Applicant) v. Canadian Cutting and Coring (Respondent) (*Withdrawn*)

2685-93-G: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Marel Contractors Ltd. (Respondent) (*Granted*)

2687-93-G: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Canrose Drywall Ltd. and Paragon Drywall Systems (Respondents) (*Granted*)

2718-93-G: Operative Plasterers and Cement Masons International Association of the United States and Canada Local 598 (Applicant) v. C.A. Tedesco Waterproofing Inc. (Respondent) (*Granted*)

2723-93-G; 2943-93-G: Construction Workers Local 53, CLAC (Applicant) v. Empire Roofing Corporation (Respondent) (*Granted*)

2727-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Calvano Lumber & Trim Co. Ltd., Cerveira Trimming Co. Ltd., Devon Builders Hardware Ltd. (Respondents) (*Granted*)

2734-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. Bairrada Masonry Inc. (Respondent) (*Granted*)

2766-93-G: Local 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Black & McDonald Limited (Respondent) (*Withdrawn*)

2780-93-G; 2781-93-G: Drywall Acoustic Lathing & Insulation Local 675 (Applicant) v. Maxan Drywall Limited (Respondent) (*Granted*)

2872-93-G: International Union of Bricklayers & Allied Craftsmen Local 12 (Applicant) v. George & Asmusen Limited (Respondent) (*Granted*)

2883-93-G: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Rally Painting and Decorating Ltd. (Respondent) (*Granted*)

2887-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. Sanvilla General Construction Ltd. (Respondent) (*Granted*)

2913-93-G: Labourers' International Union of North America, Local 1081 (Applicant) v. D. & C. Reinforcing Limited (Respondent) (*Withdrawn*)

2928-93-G: United Brotherhood of Carpenters and Joiners of America, Local 1988 (Applicant) v. Doran Contractors Limited (Respondent) (*Withdrawn*)

2935-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. Raf-Tar Construction Inc. (Respondent) (*Withdrawn*)

2938-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. Senator Homes (Respondent) (*Withdrawn*)

2939-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. Fred Gatto Construction Ltd. (Respondent) (*Withdrawn*)

2942-93-G: Construction Workers Local 53, CLAC (Applicant) v. Empire Roofing Corporation (Respondent) (*Withdrawn*)

2946-93-G; 2947-93-G: Drywall Acoustic Lathing & Insulation Local 675 (Applicant) v. E.G. Interior General Contractors (Respondent) (*Granted*)

2948-93-G; 2949-93-G: Drywall Acoustic Lathing & Insulation Local 675 (Applicant) v. Majestic International Marketing Group Inc. and Majestic Interior Systems and Demo Inc. (Respondent) (*Granted*)

2965-93-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Atelier's Roofing & Sheet Metal (Respondent) (*Withdrawn*)

2998-93-G: International Union of Bricklayers and Allied Craftsmen Local #4 Ontario (Applicant) v. Q-Tech Limited (Respondent) (*Withdrawn*)

3021-93-G: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Jose Monteiro Carpentry (Respondent) (*Withdrawn*)

3023-93-G: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Bill Pfannenstiel Trim (Respondent) (*Granted*)

3025-93-G: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Parity Drywall & Acoustics (Respondent) (*Granted*)

3028-93-G: International Association of Heat & Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. JSK Insulation Limited (Respondent) (*Granted*)

3052-93-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Rite Air Mechanical Co. Ltd. (Respondent) (*Withdrawn*)

3071-93-G: Sheet Metal Workers' International Association, Local Union No. 30 (Applicant) v. Michael Sibio c.o.b. as Sibio Sheet Metal (Respondent) (*Granted*)

3077-93-G: Sheet Metal Workers' International Association, Local Union No. 30 (Applicant) v. Rep Ventilation Ltd. (Respondent) (*Granted*)

3098-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. John Maggio Excavating Ltd. (Respondent) (*Granted*)

3104-93-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Valleriani Masonry Limited (Respondent) (*Granted*)

3107-93-G: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Taylor Masonry Ltd. (Respondent) (*Granted*)

3124-93-G: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Vaughan Masonry Inc. (Respondent) (*Withdrawn*)

3126-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. CPP Plumbing Limited (Respondent) (*Granted*)

3143-93-G; 3144-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Williams Contracting Ltd. (Respondent) (*Granted*)

3150-93-G: Quality Control Council of Canada (Applicant) v. Certified Testing Systems Inc. (Respondent) (*Granted*)

3167-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Williams Contracting Ltd. (Respondent) (*Granted*)

3193-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Charles J. Wilson Limited (Respondent) (*Withdrawn*)

3203-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Concept Systems Electric (Respondent) (*Withdrawn*)

3208-93-G: United Brotherhood of Carpenters and Joiners of America Local 93 (Applicant) v. M.C.Y. Construction (1989) Ltd. (Respondent) (*Withdrawn*)

3283-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local Union 599 (Applicant) v. Bumsteads Electric Plumbing & Heating Limited (Respondent) (*Granted*)

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1227-89-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Honeywell Limited (Respondent) (*Dismissed*)

1367-92-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Armor Masonry and Precast Ltd. (Respondent) (*Dismissed*)

1485-92-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Armor Masonry and Precast Ltd. (Respondent) (*Dismissed*)

3073-92-G: Sheet Metal Workers International Association, Local 504 (Applicant) v. Metalbestos Erectors Limited (Respondent) (*Dismissed*)

0183-93-U: Christopher Lawrence Tweedie (Applicant) v. Amalgamated Transit Union Local #113 and Toronto Transit Commission (Respondents) (*Dismissed*)

1688-93-JD: International Brotherhood of Electrical Workers, Local Union 120 (Applicant) v. Labourers' International Union of North America, Local 1059 and Ellis-Don Construction Ltd. and Ainsworth Electric Co. Limited (Respondents) (*Dismissed*)

2001-93-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. 954633 Ontario Inc. c.o.b. M & S Plumbing (Respondent) (*Dismissed*)

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3273-93-M: 95446 Ontario Ltd. c.o.b. as Fort Malden Mall (Applicant) v. United Food and Commercial Workers U.F.C.W. Locals 175 and 633 (Respondent) (*Withdrawn*)

*Ontario Labour Relations Board,
400 University Avenue,
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February 1994



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A Monthly Series of Decisions from the
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3095-92-U Ontario Secondary School Teachers' Federation, Applicant v. Essex County Board of Education, Responding Party

Evidence - Practice and Procedure - Union requesting that employer be directed to produce copy of "pay equity report" prepared by consultant - Employer submitting that report's production prevented by provisions of *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* - Board directing that report be produced - Board finding report relevant and determining that production not prevented by *MFIPPA* - Sections 51(1) and 51(2) of *MFIPPA* ensuring that Board's power to compel witnesses and production of documents maintained

BEFORE: *Roman Stoykewych*, Vice-Chair, and Board Members *W. H. Wightman* and *K. Davies*.

DECISION OF THE BOARD; February 2, 1994

1. This is an application pursuant to section 91 of the *Labour Relations Act*.
2. The Board has conducted hearings in this matter on numerous days commencing April 27, 1993. Further hearing dates are scheduled in March, April and May of 1994. At the hearing held on November 19, 1993, during the course of cross-examination of Douglas Fox, counsel for the applicant requested that the Board direct the responding party to produce certain documentary evidence, namely, a "Pay Equity Report" (hereinafter "the Report") received by the respondent from its consultant in early 1990. It was agreed that Mr. Fox, who is the responding party's Director of Education, is in possession of such document for purposes of its production; indeed, during the course of his examination-in-chief, Mr. Fox had made reference to the Report on at least one occasion. However, counsel for the responding party declined to produce the document on the grounds that the material in it is not relevant to the present proceedings and because its production is prevented by the provisions of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56 (hereinafter "*MFIPPA*"). Counsel for the employer also objected to the production of the Report because, it was asserted, the applicant is seeking to obtain the document for an improper purpose unrelated to the present litigation. The responding party requested and was granted the opportunity to provide to the Board written submissions with respect to this matter. Similarly, the applicant was provided an opportunity to respond to any such submissions. It was agreed that, should the Board direct the production of the Report, the responding party would provide the applicant a copy of it no later than February 4, 1994.
3. The Board is in receipt of the responding party's and the applicant's submissions on December 9, 1993 and January 12, 1994, respectively. Although the responding party indicated in correspondence dated January 21, 1994 that it would be "issuing a response as soon as possible", to date the Board is not in receipt of any such materials. The Board notes that a further right of response was neither requested by nor granted to the responding party employer at the hearing of November 19, 1993. In light of this, and bearing in mind the imminence of the agreed-upon deadline for the production of the Report, the Board's decision is made without reference to any further response by the employer.
4. Section 105(2) of the *Labour Relations Act* grants the Board the power, *inter alia*,
 - (a.1) to require any party to produce documents or things that may be relevant to a matter before it and to do so before or during a hearing;
 - (a.2) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce the documents and things that the Board

considers requisite to the the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases;

5. Having regard to all of the circumstances surrounding the applicant's request, including the parties' submissions, the Board cannot agree with the submissions of counsel for the responding party employer that the Report is not of sufficient relevance to permit its production. In particular, the Board notes that Mr. Fox, who has to date been the responding party's only witness, made reference to findings in the Report during the course of his evidence-in-chief on September 29, 1993, and that the subject matter of the Report touches upon the supervisory duties performed by at least some of the persons whose "employee" status is at issue in these proceedings. Consequently, in accordance with Section 105(2) of the *Labour Relations Act* and the principles set out in the Board's decision in *Shaw-Almex Industries Limited*, [1984] OLRB Rep. Apr. 659, we are satisfied that the Report could be relevant to the determination of the issues before the Board in this case.

6. Furthermore, the Board is not satisfied that the responding party's objections to production based on the provisions of *MFIPPA* are meritorious. Counsel for the employer relied on various provisions of that Act to support the proposition that the applicant had no right to the production of the Report and that this Board had no jurisdiction to direct his client to deliver the Report to the applicant. It is unnecessary for the Board to determine whether or not the provisions referred to by the responding party constitute "exemptions" to the general rule of access to information under *MFIPPA*. However, the Board notes that subsection (1) and (2) of Section 51 of *MFIPPA* provide as follows:

- (1) This Act does not impose any limitation on the information otherwise available by law to a party to litigation;
- (2) This Act does not affect the power of a court or a tribunal to compel a witness to testify or compel the production of a document.

7. We are satisfied that, in light of this provision, none of the other restrictions to access set out in the *MFIPPA* affect the exercise of the Board's powers to direct production of documents under section 105(2) of the *Labour Relations Act*. Although the Legislature appears to have taken considerable pains to ensure that certain categories of information, as set out in sections 6 to 15 of *MFIPPA*, are exempted from the usual requirements of disclosure under the Act, the legislation is abundantly clear that such restrictions do not interfere with the powers of tribunals such as the Labour Relations Board to compel production of documents in the course of litigation before it. Accordingly, the Board does not accept the responding party's arguments in this respect as well.

8. In the result, the Board is satisfied that the Report sought by the applicant is potentially relevant to the issues raised in these proceedings, and that there is no statutory prohibition otherwise preventing its production. Accordingly, pursuant to its powers under Section 105(2) of the *Labour Relations Act*, the Board directs the responding party to provide the applicant with a copy of the Pay Equity Report it received early in 1990 from the consultant it retained in that regard by no later than February 4, 1994.

3252-93-U International Alliance of Theatrical Stage, Employees and Moving Picture Machine Operators of the United States and Canada, Local 357. Applicant v. Famous Players Inc., Responding Party

Strike - Strike Replacement Workers - Unfair Labour Practice - Subsequent to commencement of strike by projectionists, manager at struck movie theatre assigned to theatre in Montreal where she worked several hundred hours as projectionist in order to complete apprenticeship - Manager then returning to struck location and doing work of striking projectionists - Board finding that assignment to struck location amounting to 'transfer' within meaning of the Act - Employer violating Act by transferring manager to struck location after date of notice to bargain - Employer directed to stop using manager to do bargaining unit work

BEFORE: *Sherry Liang*, Vice-Chair, and Board Members *R. M. Sloan* and *J. Redshaw*.

APPEARANCES: *Craig Flood* and *Larry Miller* for the applicant; *Harry Freedman*, *Michael Scher*, *Brian Holberton* and *Doug Smith* for the responding party.

DECISION OF S. LIANG, VICE CHAIR, AND BOARD MEMBER J. REDSHAW; February 4, 1994

1. This is an application brought under the provisions of section 91 of the *Labour Relations Act*, in which the union (also referred to in this decision as "IATSE") alleges that the employer (also referred to as "the theatre") has contravened section 73.1 of the Act.

2. By decision dated December 20, the Board gave a "bottom-line" ruling, stating that by using Christine Knudsen to perform bargaining unit, the employer is in contravention of section 73.1 in that it is using a person transferred into a struck location after notice of desire to bargain was given. The Board directed the employer to stop using Christine Knudsen for this purpose. We now provide our reasons for that ruling.

3. Section 73.1(1) to (6) provides:

73.1- (1) In this section,

"employer" means the employer whose employees are locked out or are on strike and includes an employers' organization or person acting on behalf of either of them; ("employeur")

"person" includes,

- (a) a person who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations, and
- (b) an independent contractor; ("personne")

"place of operations in respect of which the strike or lock-out is taking place" includes any place where employees in the bargaining unit who are on strike or who are locked-out would ordinarily perform their work. ("lieu d'exploitation à l'égard duquel la grève ou le lock-out a lieu")

(2) This section applies during any lock-out of employees by an employer or during a lawful strike that is authorized in the following way:

- 1. A strike vote was taken after the notice of desire to bargain was given or bargaining had begun, whichever occurred first.

2. The strike vote was conducted in accordance with subsections 74(4) to (6).
 3. At least 60 percent of those voting authorized the strike.
- (3) For the purposes of this section and section 73.2, a bargaining unit is considered to be,
- (a) locked out if any employees in the bargaining unit are locked out; and
 - (b) on strike if any employees in the bargaining unit are on strike and the union has given the employer notice in writing that the bargaining unit is on strike.
- (4) The employer shall not use the services of an employee in the bargaining unit that is on strike or is locked out.
- (5) The employer shall not use a person described in paragraph 1 at any place of operations operated by the employer to perform the work described in paragraph 2 or 3.
1. A person, whether the person is paid or not, who is hired or engaged by the employer after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
 2. The work of an employee in the bargaining unit that is on strike or is locked out.
 3. The work ordinarily done by a person who is performing the work of an employee described in paragraph 2.
- (6) The employer shall not use any of the following persons to perform the work described in paragraph 2 or 3 of subsection (5) at a place of operations in respect of which the strike or lock-out is taking place:
1. An employee or other person, whether paid or not, who ordinarily works at another of the employer's places of operations, other than a person who exercises managerial functions.
 2. A person who exercises managerial functions, whether paid or not, who ordinarily works at a place of operations other than a place of operations in respect of which the strike or lock-out is taking place.
 3. An employee or other person, whether paid or not, who is transferred to a place of operations in respect of which the strike or lock-out is taking place, if he or she was transferred after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
 4. A person, whether paid or not, other than an employee of the employer or a person described in subsection 1 (3).
 5. A person, whether paid or not, who is employed, engaged or supplied to the employer by another person or employer.

4. The material facts to this application are not in dispute, and were outlined as stipulated facts in the parties' oral submissions to the Board. The employer operates two theatres in Kitchener. The union represents the projectionists employed at these theatres. There is one projectionist per theatre. The employer and the union were parties to a collective agreement covering these projectionists which expired on January 7, 1993. Notice to bargain was sent on November 26, 1992. Despite bargaining throughout much of 1993, no agreement was reached. On September 3, 1993, a "no-Board" report was issued, and on September 20, the union commenced a strike.

5. At the time the parties were engaged in bargaining the theatre employed, in addition to the projectionists, a Manager (Christine Knudsen), and several assistant managers. The parties are agreed that one of these, Darren Phillips, was transferred by the employer to its Kitchener operations after the notice to bargain was given. In addition, the theatre employs ushers, cleaners and confectionery employees, who are not represented by any union.

6. When the strike began, one of the theatres closed. The other, Kings College Square Cinema, remained open. At the time, Christine Knudsen was the holder of an apprentice licence under the *Theatres Act*. The Regulations under the *Theatres Act* permitted her to operate projection equipment in a theatre only under the direct supervision of a licensed projectionist. The employer decided to have Ms. Knudsen operate the projection equipment at Kings College Square under the supervision of Mr. Phillips during the strike.

7. The union filed a complaint alleging that the employer's use of Mr. Phillips contravened section 73.1 of the Act, and by decision made on October 7, the Board upheld this complaint, directing, among other things, that the employer stop using Mr. Phillips to supervise the work of Christina Knudsen.

8. As a result of this decision, the Kings College Square Cinema closed. The employer then decided that it would remove Ms. Knudsen from Kitchener, and have her work at other of its facilities. The purpose of this move was to have Ms. Knudsen work sufficient hours as an apprentice projectionist to enable her to write the licensing exam. The employer wished to have Ms. Knudsen acquire a projectionist licence in order that it be able to re-open the Kings College Square Cinema using Ms. Knudsen as a projectionist.

9. The *Theatres Act* and Regulations set out the circumstances under which a person holding an apprentice licence may acquire a projectionist licence. In the *Theatres Act*, it is provided:

28.-(2) Subject to subsection (4), a person;

(a) who is the holder of an apprentice licence and who has served as an apprentice for the period prescribed by the regulations; or

...

and who has passed the examinations and test required by the Director for a second-class licence, is entitled, on payment of the prescribed fee, to be issued a second-class licence by the Director.

10. Regulation 1031 under the *Theatres Act* states:

34.-(7) The period prescribed to be served as an apprentice projectionist under clause 28(2) (a) of the Act is a minimum of 800 hours under the supervision of a first-class or second-class projectionist.

11. At the beginning of the strike, Ms. Knudsen had not served any time as an apprentice projectionist. Until the Board ruled that the employer could not use Mr. Phillips to supervise Ms. Knudsen, Ms. Knudsen accumulated 170.5 hours working as an apprentice projectionist under Mr. Phillip's supervision. On October 14, Ms. Knudsen started working at the employer's Toronto training and warehouse facility as an apprentice projectionist. Between October 14 and October 22, she accumulated 56.5 more hours at this facility. During this period, her day to day duties as a manager at the Kitchener operations were assumed by an assistant manager. Ms. Knudsen spent a brief portion of each work day, however, at the Kitchener operations, either on her way to or returning from Toronto (she lives in Kitchener).

12. After October 22, Ms. Knudsen was sent to Montreal. Between October 25 and December 11, she worked as an apprentice projectionist at two theatres operated by the employer, supervised by a projectionist licensed under the Ontario *Theatres Act*. Ms. Knudsen worked alongside the other employees at these theatres, performing the same duties and working the same hours. She did not displace any member of the staff, but was an addition to the regular employee complement. Again, her duties as a manager were assumed in her absence by an assistant manager. Ms. Knudsen continued to be in contact with this assistant manager, however, at first by telephone a few times a week and then towards the end of her time in Montreal, daily by telephone.

13. By December 11, Ms. Knudsen had worked 803 hours as an apprentice projectionist. Ms. Knudsen left Montreal and wrote the licensing exam on December 14. On December 15, she was informed she had passed the exam and received her projectionist licence. She then returned to the Kitchener location and assumed her duties as Manager, as well as performing work in the bargaining unit.

14. On December 17, the Kings College Square Cinema re-opened, with Ms. Knudsen performing the work of the projectionist.

15. While Ms. Knudsen was away from Kitchener, she continued to have the title of Manager for the Kitchener operations, and she continued to be paid as the Manager for Kitchener. She also continued to report to the District Manager responsible for South-western Ontario. Ms. Knudsen maintained her residence in Kitchener throughout (although from October 25 to December 11, she lived in Montreal). The employer did not document her moves to Toronto, to Montreal and then to Kitchener in the way of a "Personnel and Salary Change Notice", which is how it records changes to employment status or location.

16. The parties are agreed that the preconditions outlined in section 73.1(2) of the Act have been met in this case.

17. The parties' arguments are presented in necessarily abbreviated form. The employer argues that Ms. Knudsen has never transferred away from Kitchener (thus she cannot be considered to have transferred *to* Kitchener), and that she has never stopped "ordinarily" working in Kitchener. In counsel's submission, sections 73.1(2) and (6) must be read together, in the sense that if Ms. Knudsen "ordinarily" worked in Kitchener throughout the relevant period, she cannot be considered as having "transferred" either away or back to Kitchener. A "transfer" must be more than a temporary period of training, or a temporary assignment to a different location. Counsel acknowledged that Ms. Knudsen was "working" while she was in Toronto and Montreal, although he characterized her time away from Kitchener as more like being "at projectionist university".

18. In counsel's submission, section 73.1 focuses on the pool of people whom the Legislature has decided cannot be used to perform bargaining unit work during a strike. Section 73.1 draws an "enclosure" around this pool of persons. What the section does *not* do, however, is prevent an employer from improving the qualifications of persons who would otherwise be lawfully entitled to perform bargaining unit work during a strike. Further, it was urged, the pool of persons is established as of the date of the notice to bargain. Counsel agrees, however, in response to a question from the Board, that if a person that might have otherwise lawfully been entitled to perform bargaining unit work as of the date of the notice to bargain transfers out of the struck location (applying the *employer's* definition of "transfer"), and then returns, that this person would be prohibited upon his/her return from performing bargaining unit work. Essentially, the employer dis-

agrees with the union that Ms. Knudsen's re-locations out of and back to Kitchener can be characterized as "transfers".

19. The union argues that when Ms. Knudsen left Kitchener to work in Toronto and Montreal, she was no longer "ordinarily" working at the Kitchener operations. She was not, therefore, at the time the complaint was filed, a managerial person lawfully entitled to do bargaining unit work. Section 73.1(6)(2) speaks in the present tense, and allows the Board to take an ongoing view of the situation. Unlike 73.1(6)(3), there is no reference to a specific point in time. Therefore, the question is whether at the time the complaint is made of a contravention of section 73.1(6)(2), a person can be said at that moment to be "ordinarily" working away from the struck location. In the union's submission, as of December 14, Ms. Knudsen was ordinarily working in Montreal.

20. Alternatively, Ms. Knudsen was transferred out of Kitchener, and then transferred back. By using Ms. Knudsen to perform bargaining unit work upon her return, the employer is in contravention of section 73.1(6)(3). In the union's submission, it is important to place these facts in the context of the Board's previous decision relating to these parties. The employer was prevented, as a result of that decision, from continuing to have Ms. Knudsen perform the work which it wished her to perform in Kitchener. The employer was thus compelled to find another location where she could continue to perform the same work. In these circumstances, there is no reason not to consider Ms Knudsen's moves as "transfers". These facts are qualitatively different from a situation where a person leaves his or her workplace for day to undergo special training.

21. The union also asserts that section 73.1 should be interpreted in a way which takes into account the parties' expectations at the moment where a decision is made about whether or not to engage in economic sanctions. Here, the union made its decision to go on strike based on the situation before it, which included the fact that Ms. Knudsen would be unable to operate the projection equipment during the strike. If the Board permits the employer to use Ms. Knudsen after her return to the workplace to operate the projection equipment, it would be permitting an employer to reconfigure its workplace to avoid the intent of section 73.1. Such an interpretation of section 73.1 would encourage employers to delay the resolution of strikes until they can train their managers to perform bargaining unit work.

22. In the Board's previous decision between these parties, the general thrust of section 73(1) was described as follows:

42. The purpose of section 73.1 is to inhibit a struck employer's ability to carry on business. The Legislature has decided that it is appropriate to enhance the union's power to wage a successful strike, by limiting the means open to an employer to resist. When bargaining unit members withdraw their labour, the employer is prohibited from drawing upon specified pools of replacement labour (bargaining unit members who don't support the strike and may wish to work, employees from other locations, managers from other locations, transferees after the notice to bargain is given, the employees of a subcontractor, volunteers, etc.). Section 73.1 is not confined to "strike breakers" in the traditional sense. It encompasses a wide variety of potential sources of substitute labour. It is substitute labour or "replacement workers" that is the focus of the section, and it is in that light that one must consider the concept of bargaining unit work: the Statute prohibits employers from using replacement workers to get the strikers' job done.

[File No. 2036-93-U unreported decision of the Board dated December 16, 1993 [now reported at [1993] OLRB Rep. Dec. 1270]].

23. In our view, the resolution of this case turns on the meaning to be assigned to the term "transferred" which is one manner in which the statute defines a replacement worker. The Board

was provided with no cases in which this term has been interpreted by other tribunals, nor do we have the benefit of any other authority on the subject. Each party, in essence, appealed to the Board's common sense to support their interpretation of these provisions. At the same time, each party sought to place the interpretation of this term within a broader elaboration of the statutory context within which it is found, and particularly, the overall meaning and purposes of section 73.1 as a whole. We are indebted to counsel for their thoughtful and thorough explorations of what are obviously, given the dearth of authorities provided to us, relatively uncharted waters.

24. We are not inclined to provide any exhaustive analysis of the content of section 73.1(6)(3), which will have to evolve as the Board gains more experience in applying these provisions to new facts which present themselves. Rather, we seek to interpret these provisions to the extent necessary to apply them to the facts before us in this case.

25. We begin with the plain and ordinary meaning of "transferred". With the exception of the employer's argument regarding its own practices, discussed below, neither party suggested that the term ought to be given other than its plain and ordinary meaning. The *Oxford English Dictionary* (1971) defines the verb "transfer" as: "to convey or take from one place, person etc. to another; to transmit, transport, to give or hand over from one to another". This certainly appears to capture the facts before us, which involve the physical relocation of a person from one workplace to another to perform work for her employer.

26. The employer wishes us to apply the notion of "transfer" more narrowly, having regard to the fact that as an employer it has a specific meaning which it assigns to this notion. We see no reason to give pre-eminence to the employer's characterization of Ms. Knudsen's movements out of and back to Kitchener. First, there is no place in a scheme of statutory rights for the subjective understandings of one party to provide the content of the rights. Further, the documents provided to the Board illustrate that even this employer has designated as "transfers" on its Personnel and Salary Change Notices such changes as: a change of job from Assistant Manager to Manager at the same work location, a change of job from Assistant to Acting Manager at the same location, a change of job from Acting Manager at one location to Assistant Manager at another location.

27. The employer also submits that if the Board considers the facts before us to constitute a transfer, then any temporary re-assignment of an employee out of a work location would also constitute a transfer. We do not agree. There may well be circumstances where it would be absurd, or where there is no discernible labour relations reason, to prohibit the use of a person who has temporarily left and returned to a workplace, to perform work which she otherwise would lawfully have been entitled to perform. Thus, the union does not quarrel with the notion that a one-day training session outside of the office would probably not constitute a transfer away from the workplace.

28. The facts in this case, however, are far from this. Here, Ms. Knudsen was sent to other locations operated by this employer, specifically to perform work which, but for the previous decision by this Board, she would have continued to perform in Kitchener. It is clear that after the decision of this Board on October 7, the employer decided that the most useful means of employing Ms. Knudsen was not in Kitchener, but in Toronto and in Montreal. After December 15, the most useful location in which Ms. Knudsen could provide services to the employer became, once again, the Kings College Square Cinema in Kitchener. The period of time of Ms. Knudsen's assignment away from Kitchener was not merely a day or two, but two months. In total, she worked 56.5 hours in Toronto and then 576 hours in Montreal. Her duties while she was away from Kitchener (particularly in Montreal) consisted of the same duties as those performed every day by other employees at other locations. We do not view it as significant that Ms. Knudsen was an addition to

the regular employee complement at the Montreal theatres. This was a choice made by the employer as to how to organize its workforce, and it does not take away from the fact that Ms. Knudsen was sent to Montreal because it was viewed as the most productive use of her services.

29. We also do not view it as significant that it was always the employer's intention to return Ms. Knudsen to Kitchener after she had completed her required hours of work in Toronto and Montreal. There is nothing in the language of section 73.1(6)(3), and no policy reason why the term "transfer" ought to be read to exclude temporary transfers. Indeed, in our view, it would be a curious result if section 73.1(6)(3) were to read to prohibit the use of persons permanently, but not temporarily, transferred into a struck operation.

30. We do not see it relevant to our determination that in the previous decision of the Board relating to similar issues (the decision of October 7, 1992), the Board found that Mrs. Knudsen was not caught by the "transfer" prohibition. That decision was made *before* the events occurred which gave rise to the current application.

31. Finally, we find it unnecessary to determine whether Ms. Knudsen was "ordinarily [working] at a place of operations other than a place of operations in respect of which the strike or lock-out is taking place" during the relevant times. We agree that if Ms. Knudsen was *no longer* ordinarily working in Kitchener, then the employer cannot place her back in Kitchener in order to perform bargaining unit work, because of section 73.1(6)(2). However, it does not follow that a person can *only* be considered to have been transferred to or out of a location for the purposes of section 73.1(6)(3) where she has undergone a change in her "ordinary" place of work.

32. We do not read the provisions of section 73.1(6) to require the coupling of the terms "ordinarily works" and "transferred". Section 73.1(6) sets out a series of prohibitions. Some of the prohibitions share common language or concepts; however, each is also each capable of being applied separately from the others. As between 73.1(6)(1) and (2) the language of the statute sets out a clear dividing line: one provision refers to an employee or other person *other* than a manager and the other provision refers to managers. However, the dividing line between some of the other provisions is less clear. For instance, it appears that there may be some overlap between 73.1(6)(4) and (5). Therefore it is not apparent to us that the provisions of section 73.1(6) are a series of watertight compartments. Although it is helpful to refer to the others in an interpretation of one, it is not necessary that the various prohibitions be read to qualify or limit each other.

33. Further, a person who is not covered by one prohibition may be covered by another. For instance, all parties might agree that at the time of the inquiry, a given manager was ordinarily working at a struck location and is thus not prohibited from doing bargaining unit work under section 73.1(6)(2). That does not end the inquiry, however if, as here, it is alleged that the person was transferred to the operations after the times specified in section 73.1(6)(3). Alternatively, we can anticipate that there may be persons who on a given set of facts are covered by *both* these prohibitions.

34. In short, the term "transfer" is in its ordinary sense capable of being applied to the facts before us. Further, we find no absurdity, and no irrational labour relations result in such an interpretation. The statute precludes an employer from using the services of a person who has been transferred into a struck location to perform bargaining unit work, where that person is transferred after the date that notice to bargain was given. There is no reason to read these provisions as applying *only* at the point at which notice to bargain is given, such that there is from that moment on, a fixed pool of persons lawfully entitled to perform bargaining unit work, and a pool of persons

not lawfully entitled to perform bargaining unit work. A person may be lawfully entitled to performing bargaining unit work at the time that notice to bargain is given. The language of the statute allows for the possibility that an employer will lose the capacity to use that person to perform bargaining unit where she is transferred out of the location and transferred back to the location. There may well be situations involving temporary absences which do not constitute "transfers" because they do not constitute any meaningful relocation of a person's place of work from one operation of an employer to another. We are satisfied that the circumstances of this case involved a transfer of a person from Kitchener, and a transfer back to Kitchener.

35. We have indicated that our application of the provisions of section 73.1(6)(3) to the facts before us, and our finding that there has been a "transfer" of Ms. Knudsen to Kitchener, do not lead to any irrational labour relations results. Moreover, we find the results in this case consistent with the general thrust of section 73.1(5) and (6). In general, the provisions of section 73.1(5) and (6) focus on the type of attachment that an individual has to the (in this case) struck location or employer. A change to the nature of that attachment, and the date at which that occurs, may have consequences on an employer's ability to use that person to perform bargaining unit work during a strike. By focusing on these changes and the time at which they occur, the provisions of section 73.1 in a sense encourage the preservation of a *status quo* during the period of bargaining. They discourage employers from reconfiguring their workplaces in anticipation and to avoid the effect of a strike, by limiting the type of persons who may be used as replacement workers. It is entirely in keeping with this notion to consider the *status quo* as having been broken when an individual is re-located to another place of operation to serve what is essentially a period of apprenticeship, to enable her to return to work, not so much as a manager, but as a projectionist.

36. For these reasons, the Board made the findings and directions contained in our ruling of December 20, 1993.

DECISION OF BOARD MEMBER R. M. SLOAN; February 4, 1994

1. I strongly dissent from the majority decision.

2. The two issues which the Board had to adjudicate with respect to this application were: the status of Ms. Knudsen as a person permitted to do bargaining unit work under section 73.1 of the Act; and Ms. Knudsen's status with respect to the transfer provisions of that same section.

3. It is my strongly held view that neither the submissions of the parties, nor any documentary evidence filed, can support the findings of the majority decision with respect to the two aforementioned issues.

Performing Bargaining Unit Work

4. Under section 73.1 of the Act, it is clear that an employer has the right to continue to operate during a strike - the Act does, however, place certain restrictions on the personnel that an employer may use to perform the work previously done by striking bargaining unit members.

5. The issue of Ms. Knudsen's status was unequivocally and unconditionally decided in a previous Board decision dated December 16, 1993, involving the same parties - Famous Players Inc., Board file 2036-93-U [now reported at [1993] OLRB Rep. Dec. 1270] - that Ms. Knudsen was indeed permitted to do bargaining unit work during the strike. The Board's Decision in this respect is recorded in paragraph 6 which reads:

"She holds an apprentice projectionist's licence that permits her to operate projection equip-

ment "under the direct supervision" of another licensed operator. Ms. Knudsen has worked in Kitchener since January 1992, but she has not worked as an apprentice projectionist, nor operated projection equipment as part of her regular duties. However, because she was on site *prior* to the notice to bargain, she is not caught by the "transferee limitations" of section 73.1. Unlike Mr. Phillips, *she is allowed to do bargaining unit work during a strike.*"

(emphasis added)

6. There are no provisions in the Act which freeze qualifications of those persons found to be permitted to do bargaining unit work and the employer was perfectly within its rights to upgrade Ms. Knudsen's qualifications. In paragraph 21 of the majority decision the speculation that such upgrading of skills by employers to "...reconfigure its workplace" and "...delay the resolution of strikes" is inappropriate when there is absolutely no prohibition either explicit or implied in the legislation against the acquiring of new skills or qualifications, or their upgrading.

7. It is my view, to the extent that the drafters of the legislation considered it all, the provisions in section 73.1 dealing with the right to use persons to do bargaining unit work fix that right - once it is established - for the duration of the strike, otherwise we would expect that the Act would contain specific language to deal with issues or subsequent "transfers" out of and back into a specific location. I do not believe that it is helpful for the majority to read into the Act provisions that are not there.

The Issue of Transfer

8. To illustrate the difficulty the majority faces in attempting to explain its findings, paragraph 25 of the majority decision states, in part:

We begin with the plain and ordinary meaning of "transferred". The *Oxford English Dictionary* (1971) defines the verb "transfer" as: "to convey or take from one place, person etc. to another; to transmit, transport, to give or hand over from one to another". This certainly appears to capture the facts before us, which involve the physical relocation of a person from one workplace to another to perform work for her employer.

Applying this definition to the circumstances of Ms. Knudsen's physical absence from Kitchener it is all too clear that no transfer took place. Ms. Knudsen was not physically "relocated" from one workplace to another, she continued to be employed at and out of Kitchener, and she did not "perform work" while absent from her Kitchener workplace *she was undergoing training*.

9. A more appropriate definition which supports the premise that Ms. Knudsen's training assignment was not a transfer can be found in Roberts' Dictionary of Industrial Relations (third edition) page 722 - which reads, in part:

"The shifting or movement of an employee from one job to another"

"Transfers may be on a temporary basis, as when work is in short supply, or on a permanent basis when an individual seeks a job in another department or operation of the plant"

10. The majority decision in my view unfortunately characterizes Ms. Knudsen's absence as a transfer to another job as we see in paragraph 8:

8. "The employer then decided that it would *remove* Ms. Knudsen from Kitchener and have her *work* at another of its facilities".

...

11. Her day to day duties as a manager at the Kitchener location were assumed by an assistant manager”.

12. “...but was an addition to the regular employee complement”

11. The majority decision is not supported by the relevant facts submitted by the responding party - which were not disputed by the applicant - they include:

a) Christina Knudsen commenced employment at the responding party's theatres in Kitchener in November, 1988. She has been the Manager since January 20, 1992.

Ms. Knudsen worked at the responding party's theatres in Kitchener and has been employed there continuously by the responding party since November, 1988.

(emphasis added)

b) Ms. Knudsen holds a Projectionist Licence within the meaning of section 24 of the Theatres Act. Prior to December 15, 1993, Ms. Knudsen's licence was classified as “Apprentice”. Ms. Knudsen obtained a First Class Projectionist Licence on December 15, 1993.

c) Commencing October 14, 1993, Ms. Knudsen commenced undergoing training at other facilities operated by the responding party in order for her to qualify to take the prescribed examination for a First Class Projectionist Licence. She received training at the responding party's facilities in Metropolitan Toronto and Montreal, Quebec.

(emphasis added)

d) Ms. Knudsen was under the direct supervision of licenced projectionists while training. During that time, she was not added to the employee complement of the responding party at those facilities. Her attendance at those locations was only for the purpose of receiving the training required to enable her to take the prescribed examination.

(emphasis added)

e) Ms. Knudsen completed her training on December 11, 1993. Ms. Knudsen took the prescribed examination to receive her First Class Projectionist Licence on Tuesday, December 14, 1993. Ms. Knudsen was advised that she had successfully completed the examination on Wednesday, December 15, 1993 and the licence was issued on that date.

f) According to counsel for the employer between October 7, 1993 and December 11, 1993, Ms. Knudsen continued to be the Manager of the responding party's theatres in Kitchener, Ontario. She regularly remained in contact with Nicole Mayer, the Assistant Manager of the theatre. Ms. Knudsen and Ms. Mayer reviewed the maintenance of the theatre, staffing, preparation of weekly reports, and the steps necessary to open the theatre December 17, 1993 while Ms. Knudsen was undergoing her training.

g) Ms. Knudsen continued to report to the District Supervisor responsible for the area in which Kitchener is located. The responding party has different District Supervisors responsible for Kitchener, Metropolitan Toronto and Montreal.

12. Of even greater significance is the ignoring by the majority of the transfer practices utilized by the responding party in transferring management personnel.

13. Counsel for the responding party asserted that:

a) The responding party did not transfer Ms. Knudsen to another position or location between October 7, 1993, and December 17, 1993. Ms. Knudsen continued to be responsible for the theatres in Kitchener, no change was made to her status, and her salary continued to be charged against the budget of the responding party's theatre in Kitchener. Attached at Tab 2 are all of the responding party's Personnel and Salary Change Notice forms relating to Ms. Knudsen as a managerial employee.

b) *Ms. Knudsen had neither been transferred from Kitchener nor has been transferred to Kitchener at any time material to this application.*

(emphasis added)

c) When the responding party transfers its managerial employees from one position or location to another, a "Personnel and Salary Change Notice" form is completed and placed in the appropriate file. When the responding party transferred Mr. Phillips from Toronto to Kitchener in December, 1992, a Personnel and Salary Change Notice form was completed. Similarly, when Mr. Phillips was transferred from Kitchener to Toronto in October, 1993, another such form was completed.

d) Ms. Knudsen is a person who exercise managerial functions who ordinarily works at the responding party's theatres in Kitchener.

14. Counsel for the applicant asserted that while Ms. Knudsen was absent undergoing training she remained under the direction and control of the responding party. Such an assertion bolsters the case for the responding party confirming that this was one further aspect of Ms. Knudsen's position that remained unchanged.

15. It is clear to me that in interpreting the transfer provisions of section 73.1, the Board has to give cognizance to the normal transfer practices employed within the responding party's organization, and by failing to do so reaches an erroneous conclusion.

16. Finally the majority errs, in my view, by looking to the ordinary meaning of the word transfer while totally ignoring what certainly must have been in the minds of the framers of the legislation and that is the meaning of transfers in the labour relations context.

17. Employers and unions have for decades negotiated detailed and sometimes elaborate language to define the term "transfer" and to specify the terms and conditions under which transfers take place - temporary and permanent, and into and out of - jobs, classifications, and bargaining units. The purpose of which is to understand what is meant by a transfer to protect and promote the interests of both the employees and employers.

18. It will come as a considerable surprise to the labour relations community to learn that an absence by an employee from his/her ordinary place of work for more than two (2) days for training purposes means that such an employee is no longer considered to be working at that location, and that the employee has been transferred to the training location with the potential loss of all of those rights that attach to continuous service at the original location.

19. Counsel for the applicant asserted while responding to a question(s) from the Chair - that as of 17 December 1993, (the date upon which the hearing took place) that Ms. Knudsen was still effectively "working" out of Montreal despite the fact that she had already returned to Kitchener the day before and was that very day (the 17th.) attending at the Board for purposes of the hearing. This illustrates the very real labour relations problems that arise from the loose interpretation of "transfer".

20. The result of the finding of the majority cannot be logically sustained and will create serious labour relations problems for all parties in the labour relations community.

21. For all of the above reasons I would find that the majority erred in defining transfers under section 73.1 in so broad a manner as to deprive the employer of its legitimate right to employ Ms. Knudsen to do bargaining unit work.

2581-92-R Communications, Energy and Paperworkers Union of Canada, Local 521, Applicant v. **Groupe Schneider S.A.**, Schneider Canada Inc., Merlin Gerin Ltd. (Federal Pioneer Division), and Square D Company of Canada, Responding Parties

Bargaining Rights - Related Employer - Remedies - Company "A" acquiring companies "B" and "C" - Union holding bargaining rights at one of B's locations - A consolidating warehouse operations at C's location - B's unionized work transferred to C's non-union workforce, but no employees of B actually transferred - Collective agreement providing that where part of operation transferred to new location within 50 mile radius of plant, employer will recognize union as bargaining agent for those operations - Union seeking single employer declaration - Employer asking Board to exercise its discretion against making the declaration - Board declaring companies A, B and C to be one employer for purposes of the Act, but restricting declaration to warehouse operations at company B location

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *G. O. Shamanski* and *P. V. Grasso*.

APPEARANCES: *James Hayes* and *J. Smith* for the applicant; *James Knight*, *Bruce Gray*, *Paul Shemilt* and *Eric Hoffe* for the responding parties.

DECISION OF THE BOARD; February 28, 1994

1. The title of proceedings has been amended to reflect the correct names of the applicant and the responding parties.
2. This is an application under section 1(4) of the *Labour Relations Act*, arising out of the closure of a warehouse operated by Merlin Gerin Ltd. (Federal Pioneer Division) and the transfer of the work performed at that warehouse to Square D Company Canada.
3. At the time of the hearing Merlin Gerin, including the Federal Pioneer Division, and Square D were subsidiaries of Groupe Schneider S.A., a company incorporated in France and carrying on business in Canada as Schneider Canada. After the conclusion of the hearing, the parties advised the Board that Schneider Canada had become a legal entity in its own right, known as Schneider Canada Inc. There is also the suggestion that Merlin Gerin and Square D may have ceased to exist as separate corporate entities. For the purposes of this decision, however, we have assumed that they continue to exist, at minimum, as separate operating divisions of Schneider Canada Inc.
4. Section 1(4) of the *Labour Relations Act* states:

1.- (4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.
5. The responding parties agree that they are carrying on "associated or related activities or businesses ... under common control or direction" within the meaning of section 1(4), and that

the only issue is whether the Board should exercise its discretion to declare them a single employer.

6. At the request of the Board, the parties filed an agreed statement of facts. What follows is a condensed version of the agreed facts, as supplemented by the evidence of the only witness to testify in these proceedings, Eric Hoffe, who was called by the respondents.

Facts

7. Groupe Schneider is a manufacturer of electrical products with world wide operations. In the fall of 1990 Groupe Schneider acquired Federal Pioneer Ltd. Federal Pioneer had been engaged in the manufacture and distribution of electrical products in Canada since 1946. On January 1, 1993, Federal Pioneer Ltd. was merged with Merlin Gerin Ltd., a subsidiary of Groupe Schneider, losing its separate corporate identity and becoming a division of Merlin Gerin.

8. Square D is another world wide manufacturer of electrical products, operating in Canada since 1908. It too was acquired by Groupe Schneider, but in the fall of 1991.

9. At the time of the acquisitions Square D and Federal Pioneer had a number of manufacturing, assembly and distribution operations across Canada, some of which were unionized and some of which were not. One such operation was a combined Federal Pioneer manufacturing plant and warehouse at Waterman Avenue in Scarborough. The applicant held bargaining rights in respect of this operation.

10. In March of 1991, Federal Pioneer decided to lease a new warehouse in Markham. The term of the lease was one year from April 1, 1991 to March 31, 1992, followed by two six month options. By agreement of the parties, the applicant's bargaining rights were extended to cover the Markham location.

11. In the spring of 1992, Square D was conducting a warehouse and distribution operation on Rexwood Road in Mississauga. By that time it too was looking for new warehouse space. Accordingly, a Schneider Canada distribution consolidation committee was set up to examine the possibilities of integrating the warehouse and distribution operations of both Square D and Federal Pioneer. Ultimately, this process became part of an overall review already underway in respect of Schneider Canada's entire operations. The result was a decision to consolidate the two warehouses in a new facility on Caravelle Drive in Mississauga. Accordingly, on September 1, 1992, Schneider Canada announced that henceforth all warehouse, distribution, customer service and inventory control functions formerly carried out by Square D and Federal Pioneer would be transferred to the new facility.

12. At the time of the announcement the applicant represented approximately 300 production workers at Federal Pioneer on Waterman Avenue in Scarborough and ten warehouse employees at Markham. Square D's Rexwood Road facilities were non-unionized. The Schneider Canada announcement made clear that the Caravelle Drive warehouse would be a "Square D" warehouse staffed by Square D employees. On September 1, there were approximately 16 non-unionized employees at the Square D warehouse, with one resignation the day before.

13. Employees at Federal Pioneer's Markham warehouse were advised that they had the option to bump back into production jobs at the Waterman Avenue plant under the terms of the existing collective agreement. A posting also went up for a single warehouse position at Caravelle Drive. It was understood, however, that success on the posting would mean that any Federal Pio-

neer employee would be treated as a new hire at Caravelle Drive without the benefit of union representation or the Federal Pioneer collective agreement. There were no takers.

14. On September 3 and 8, 1992, the union filed policy and group grievances challenging the planned relocation as a breach of Articles 2 and 28 of the Federal Pioneer collective agreement. The grievances request the reinstatement of the ten affected employees, reimbursement of any monies lost and compliance with the collective agreement. Article 2 of the Federal Pioneer agreement states in part:

2:01 (a) The Company recognizes the Union during the term of this Agreement as the sole and exclusive bargaining agent for all employees of Federal Pioneer Limited in its Metro Toronto plants, save and except assistant foremen, persons above the rank of assistant foreman, technical, office and sales staff.

(b) The Company agrees that, if the existing operations or any part thereof covered by this Agreement, are moved to *a new Company location* outside Metro Toronto, but no further than a 50 mile radius from the Waterman plant location, restricted to Canada, the Company will recognize the Union as the bargaining agent for those operations, and will agree to negotiate a separate collective agreement for those operations.

Employees covered by this Agreement who as the direct result of the relocation are to be laid off from the Company will be advised of available opportunities and have preferential hiring status at the new location and they will retain Company service. Further, those affected employees who elect to move as a result of the relocation, closer to the premises, will be reimbursed for eligible moving expenses to a maximum of \$500.

(emphasis added)

(Article 2.01(a) describes the bargaining unit by reference to "Metro Toronto". A letter of understanding signed on April 5, 1992, however, includes the Markham warehouse within the scope of Article 2.)

15. Federal Pioneer's third step answer to the grievances is dated October 1, 1992. It states:

The Company denies that there has been, or will be, a violation of Article 2. The Company is not moving the warehousing functions to a new Company location. By matter of contract, the Company intends to have Square D Canada perform the warehousing functions. Square D Canada is a separately incorporated company, with a significant history of its own of manufacturing and distribution. Square D will shortly be moving into a new warehouse space with extra capacity. It is both efficient and cost effective for Square D to provide a warehousing service to Federal Pioneer.

In other words, having decided to relocate the work performed at the Markham warehouse to within 50 miles of the Waterman Avenue plant, Federal Pioneer was taking the position that its operations were not moving to a new "Company" (i.e. Federal Pioneer) location but to a location operated by a different company (i.e. Square D). On that basis, the response says, Article 2.01(b) does not apply. The grievances remain outstanding.

16. The work performed at the Federal Pioneer warehouse was transferred to Caravelle Drive on November 23, 1992, approximately one month after the Square D work. Of the ten bargaining unit members previously employed at Markham, two accepted early retirement. The others exercised their rights under the collective agreement to return to Waterman Avenue in manufacturing jobs. One employee moved up a pay grade, one remained at the same grade, and the other six suffered various levels of pay reduction. Two employees also declined early retirement.

Although there were no lay-offs as a result of the bumping, it was agreed that more junior employees remained on lay-off from Waterman Avenue who might otherwise have been recalled. Meanwhile, at the new Caravelle Drive facility, Square D was increasing its complement of warehouse employees to 23.

17. To round out the employment picture at Caravelle Drive and its relationship to Federal Pioneer, as at November 1992:

- (i) a former Federal Pioneer employee had transferred to the position of warehouse supervisor at Caravelle Drive;
- (ii) five of the 11 employees in the newly consolidated Customer Service Department, including the manager, had come from the Federal Pioneer Waterman Avenue plant;
- (iii) four of the 11 employees in the newly consolidated Inventory Control and Distribution Services Department had come from the Federal Pioneer Waterman Avenue plant;
- (iv) the Manager of Distribution Services for Schneider Canada located at Caravelle Drive to whom all of the foregoing departments report is Eric Hoffe, the former Manager of Distribution for Federal Pioneer; and,
- (v) all of these employees were beyond the scope of the applicant's bargaining rights and were transferred to Caravelle Drive with full salary and benefits, subject only to any adjustments made necessary by the blending of the Square D and Federal Pioneer salary and benefit structures.

18. The reasons for treating the new warehouse at Caravelle Drive as a Square D warehouse rather than a Federal Pioneer or Schneider Canada warehouse and, therefore, for not applying Article 2.01 (b) of the Federal Pioneer collective agreement, are outlined as follows in the agreed statement of facts:

The Company [i.e. Schneider Canada] advises that, at least until such time as the corporate reorganization has been completed, the Caravelle warehouse had to fall under either Square D Canada or Merlin Gerin (Federal Pioneer Division). The Company took the position that the Caravelle warehouse should be a Square D warehouse for a number of reasons:

- The Square D warehouse was moved first.
- 20 of the 23 employees employed at Caravelle commenced employment with the Caravelle warehouse at Rexwood and simply relocated with the warehouse (Exhibit 5). Ten of the 24 employees joined Square D Canada prior to the initiation of the purchase of Square D by Groupe Schneider S.A. Four of the employees were with the Rexwood warehouse when it first opened as a central warehouse in 1985. Of the other employees hired since July, 1992, two were replacements for employees who had resigned, and a third transferred from the Square D production plant in Waterloo. The increase from the budgeted to actual head count in November, 1992, was only four of 23 employees (Exhibit 4).
- The Square D warehouse was moved from one permanent location to another; whereas, the Federal Pioneer warehouse was in a temporary location.
- While both Square D and Federal Pioneer have significant warehousing requirements served by the Caravelle warehouse, Square D is considered by the Company to be larger than Federal Pioneer in terms of products handled by the warehouse (Exhibit 6, measured by space allocation and by "sku's"): Square D and Federal Pioneer are relatively equal in terms of volume of sales.

- The North American network of distribution centres is managed by Square D, as is the computerized inventory system used to control product.

19. Mr. Hoffe was cross-examined on each of these points. He conceded that the Square D work was moved to Caravelle Drive only about one month prior to the Federal Pioneer work and that this was simply a matter of "logistics". It was not a significant factor. As to the second point, Mr. Hoffe acknowledged that the reason the 20 employees moved to Caravelle Drive from Rexwood Road was because they were asked to. Apart from the single job posting, the Federal Pioneer employees received no such invitation. Mr. Hoffe also acknowledged that all but one of the ten Federal Pioneer employees had greater seniority with Federal Pioneer than the Square D employees had with Square D. The third factor was seen by Mr. Hoffe as significant because Square D always had a permanent off-site warehouse while Federal Pioneer had only operated under such an arrangement for one and a half years.

20. With respect to the fourth factor, Mr. Hoffe agreed that the only reason for any continuing distinction between Federal Pioneer and Square D was marketing and goodwill, and that in all other respects Schneider Canada was attempting to dissolve the distinctions between the two companies as part of an overall corporate reorganization. Of the three new services performed at Caravelle Drive grouped under the Schneider Canada umbrella (i.e. Inventory Control and Distribution, Customer Service, and Warehouse Facility) only one is identified as a "Square D" operation - the warehouse. The other two are described in organizational charts as Schneider Canada functions, reporting to Mr. Hoffe. In addition, while Square D products may consume a greater amount of floor space at the Caravelle Drive warehouse and account for a majority of the stock keeping units ("sku's"), the sales volumes of the two companies are roughly equivalent. The budgeted cost of the operations is charged back by Schneider Canada on a 50/50 basis.

21. As to the fifth point, Square D had three distribution centres in the U.S. while Federal Pioneer had none. Further, a decision had been made in May 1992 that the Schneider North America inventory control system, formerly the Square D system, was more efficient than the Federal Pioneer system and the latter would be gradually phased out. However, both systems continued to operate side by side at Caravelle Drive until June 1993, necessitating the training of the former Square D employees on the Federal Pioneer system. While somewhat more would have been involved in training former Federal Pioneer employees on the Square D system, Mr. Hoffe conceded that this could have been achieved at "minimal cost".

22. Finally, Mr. Hoffe denied the suggestion that the Square D identity was preserved to assist Federal Pioneer in its dispute with the union over bargaining rights at the new warehouse. According to the agreed statement, Inventory Control and Distribution, and Customer Service functions at Caravelle Drive are considered to be Schneider Canada functions because they involve centralized management and support services which are for the benefit of all Schneider Canada companies and operating divisions. Mr. Hoffe testified that Schneider Canada was not concerned about whether there was a union at Caravelle Drive, but about the wishes of the Square D employees and the relatively greater job security of the Federal Pioneer employees. The latter group had the right to bump back into manufacturing jobs at Waterman Avenue but no such contractual right existed for the Square D employees. Thus, by making Caravelle Drive a Square D warehouse rather than a Federal Pioneer or, perhaps, Schneider Canada warehouse, more jobs would be protected. Had Schneider Canada been interested in avoiding the union's bargaining rights, Mr. Hoffe said, it could simply have established the new warehouse more than fifty miles away from Waterman Avenue or contracted the work out to a third party. There are no "contracting-out" restrictions in the collective agreement. The fact that Schneider Canada chose not to do so demonstrates that it was not attempting to frustrate the union's bargaining rights.

Submissions

23. Counsel for the union reminds the Board that the basic elements of a section 1(4) declaration are present and that the only issue is whether the declaration ought to be made. In addressing this issue, the union submits that the whole object of the Schneider Canada reorganization was to dissolve any operational distinctions between the original companies, subject only to preserving original names for marketing purposes. Since there is no marketing aspect to the name on the warehouse door, counsel submits, there was no real basis for calling Caravelle Drive a Square D warehouse, rather than a Federal Pioneer or Schneider Canada warehouse, except as part of an effort to avoid the union's bargaining rights.

24. According to the union, the purposes of section 1(4) are to protect employees and trade unions from the effects of corporate change, and to enable the union to deal with the party that exercises real influence over the bargaining relationship. In this case, that party is Schneider Canada. While conceding the legitimacy of the overall corporate reorganization, union counsel characterizes the companies' arguments for designating the new warehouse a Square D warehouse as "boot-strapping". It was Schneider Canada that decided when the warehouses would move, and the actual moves were only one month apart. It was Schneider Canada that decided which employees would staff the new warehouse; if seniority had been taken into account across both companies all of the Federal Pioneer employees would now be employed at Caravelle Drive. Counsel sees no labour relations or other significance in the fact that the Square D warehouse, unlike the Federal Pioneer warehouse, had always been off-site. Similarly, while the difference in the number of "sku's" may favour Square D, this is not a sufficient reason for denying the union's bargaining rights. Counsel also sees little merit in the suggestion that the North American distribution network is managed by Square D, and notes that the Federal Pioneer employees could have been trained on the Square D system at little additional cost.

25. Where the union does recognize the potential for legitimate concern, however, is in the relatively greater job security of the Federal Pioneer employees and the right of the Caravelle Drive workforce to select its own bargaining agent. Counsel argues, however, that it would have been possible to blend the two work forces based on seniority without any effect on Square D employees hired prior to 1991. Further, if employees are dissatisfied with their bargaining agent, they can remove it at certain times.

26. The union submits that its bargaining rights have been eroded, Federal Pioneer employees have been forced to accept jobs requiring different skills at lesser rates of pay, and employees on lay-off from the Waterman Avenue plant have not been recalled. The union requests a single employer declaration to enable it to enforce the contractual provision it negotiated to deal with such moves (i.e. Article 2.01(b)) free of the effect of the changes in the employer's identity.

27. Counsel for the respondents points out that Caravelle Drive was but one small part of a much larger consolidation exercise undertaken by Schneider Canada, and whether or not the trade union ended up with bargaining rights at that location was not a factor in its thinking. The reasons for designating the Caravelle Drive warehouse a Square D warehouse were set out in the agreed statement of facts and explained by Mr. Hoffe. In the respondents' view, treating Caravelle Drive as a Square D warehouse was in the best interests of Square D, Federal Pioneer and their respective work forces, and there is no evidence of any scheme to frustrate the union's bargaining rights.

28. The respondents stress that we are dealing with the interests of an established workforce with its own body of work that has never demonstrated any appetite for collective bargaining. Counsel notes that ten of the Caravelle Drive employees joined that company prior to the announcement of the move and, hence, this is not a case of a new corporation being established to

obtain work from an existing company. While the respondents are prepared to concede that the union has suffered an erosion of bargaining rights, it argues that a single employer declaration would have the effect of extending rather than preserving those rights.

Decision

29. In determining whether or not a single employer declaration is warranted, the Board will ask itself two questions. First, do the facts disclose the kind of “mischief” that section 1(4) was intended to address? In other words, has the union demonstrated the kind of interest that section 1(4) was designed to protect? Second, and if the answer to the first question is “yes”, is there some supervening or overriding reason why the single employer declaration ought not to be granted?

30. The classic expression of the purpose of a section 1(4) declaration is set out in *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945, Oct. 1353 at para. 12:

Section 1(4) was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil. Section 1(4) ensures that the institutional rights of a trade union, and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicle(s) through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective bargaining structure; nor will alterations in legal form undermine established bargaining rights. In this respect the purpose of section 1(4) is similar to that of section [64] which preserves the established bargaining rights and collective agreement when a “business” is transferred from one employer to another. Section [64] has been part of the scheme of the Act since the mid-1960’s. Neither remedial provision requires a finding of anti-union animus; their primary application is to *bona fide* business transactions which incidentally undermine or frustrate established statutory rights.

31. The “institutional rights of a trade union” to which the Board refers include the right to represent persons employed in classifications or activities defined in the Board’s certificate or, subsequently, in the scope clause of the collective agreement. The “contractual rights of its members” are those that may be found in the collective agreement, including the right to be represented by the trade union. Section 1(4) protects these interests from changes in the identity of the employer, whether brought about by a transfer of work or employees between employers, whether the related entity is newly established or was already in existence, and whether the transaction in question is the product of legitimate business reasons or anti-union beliefs.

32. In this case, it is clear that the Federal Pioneer bargaining unit has lost a discrete body of work in which 10 of its more senior employees had been engaged. The former Markham warehouse employees have lost the positions to which their seniority had previously entitled them, and many have suffered losses in pay. Employees on lay-off from Waterman Avenue have not been recalled. In practical terms, the union no longer represents persons engaged in warehouse work and its membership has been correspondingly reduced. Through the designation of Caravelle Drive as a “Square D” warehouse, the union has also lost the opportunity to enforce Article 2.01(b) of the collective agreement. But for the rather transparent position taken by the employer that Square D would be performing the work under subcontract to Federal Pioneer, this provision may have protected the union’s bargaining rights and the employment opportunities of its members.

33. The evidence, both oral and documentary, makes clear that there was and is only one company present for labour relations purposes: Schneider Canada Inc. It was this company (or its predecessor Groupe Schneider S.A. carrying on business as Schneider Canada) that “called the

shots” on the relocation of the work and the identity of the new employer, and it is on behalf of this company that all of the Caravelle Drive activity is currently being performed. In the Board’s view, a section 1(4) declaration would give effect to this reality and would further the protection of the employee and trade union interests outlined above.

34. The respondents argue, however, that a single employer declaration ought not to be made because it would deny the Square D workforce the right to choose their own bargaining agent. It would also have the effect of extending the union’s bargaining rights to an established group of employees performing a pre-existing body of work. For a number of reasons, the Board is not persuaded by these arguments.

35. First, as a legal matter, it is not apparent to us that a section 1(4) declaration will necessarily have the effect of extending the applicant’s bargaining rights to all of the Caravelle Drive workforce. Article 2.01(b) of the collective agreement appears to require the Company to recognize the union as the bargaining agent for only “those operations” transferred. This may not include the former Square D operations. However, this distinction was not raised by the parties and may be unworkable for practical purposes. The work of the two companies is now likely sufficiently intermingled as to preclude any apportionment on labour relations grounds. In these circumstances, however, any “extension of bargaining rights” would be the result of the way in which the employer has structured its affairs, and not the application of section 1(4).

36. Second, the Board is not convinced that having structured the transaction in a manner that excluded the applicant and the Federal Pioneer workforce, and having placed the rights of the Square D employees in issue, the respondents should now be permitted to raise those rights as a basis for denying a declaration. Consistent with the labour relations reality we have found, the more appropriate course would have been for the employer to approach the trade union with its plans and to attempt to sort out the effect of its obligations under the collective agreement. Precisely to what extent this would have resulted in a different mix of employees at Caravelle Drive, the Board cannot say. It seems likely, however, that a substantial portion of the Caravelle Drive workforce would have been made up of former Federal Pioneer employees, with the applicant as their bargaining agent. The employer not having taken these steps, for reasons which the Board finds to be lacking in substance, there would be some inequity to now permit it to rely on the situation which it has itself created as a reason for denying a declaration.

37. Third, the extent to which the Board will consider, or even have the opportunity to consider, the wishes of individual employees for or against a bargaining agent will be a function of a variety of factors, including the way in which the employer has structured its affairs, the relative number of employees in issue, and the employees’ relative degree of attachment to their present status. Had the employer placed the name “Federal Pioneer” or even, perhaps, “Schneider Canada” over the warehouse doors at Caravelle Drive, the current Square D employees may simply have been considered an accretion to the applicant’s bargaining unit. Although the result may be the same as the making of a declaration, no question of statutory interpretation would have arisen. Likewise, had an entirely new company with a new workforce been established to perform the same body of work at Caravelle Drive, it is unlikely that the employer would have seriously considered raising the status of these individuals as a bar or even a serious impediment to a single employer declaration. Further, even in cases where the Board has the clear statutory authority to measure employee wishes (e.g. section 64) it may choose not to do so where numbers do not warrant or some mischief has been found. In this case, it is not clear to us that all 300 bargaining unit members at Waterman Avenue are without interest in this dispute and, accordingly, even assuming the Board has the jurisdiction to direct a vote under section 1(4), it may not be inclined to do so. It

is against this background that the respondents' arguments for withholding the section 1(4) declaration must be understood.

38. In our view, this is not a case where the wishes of the Caravelle Drive employees ought to dictate a result different from that which we have arrived at in answer to our first question. On the traditional analysis, it is clear that the union is not seeking to expand its membership, or the work opportunities of its members, through a single employer declaration rather than the certification process. Rather, it is attempting, quite legitimately, to protect its rights and those of its members that have been compromised by the change in the identity of the employer. Those rights are expressed in Article 2.01(b) of the collective agreement and the Board is unwilling to permit their frustration through the manipulation of corporate identities. In these circumstances, the fact that a section 1(4) declaration may affect the status of certain "Square D" employees is a product of the employer's initiative, not the union's.

39. As the Board noted in *The Great Atlantic and Pacific Company of Canada Limited*, [1981] OLRB Rep. Mar. 285:

We have considered the respondents' arguments with respect to "foisting" a union upon a group of employees who may not wish to be represented; however, we do not think that the wishes of the employees are the only, or even the predominant, factor to be considered in a section 1(4) application. If such were the case, the very erosion of bargaining rights which triggered the proceeding, (and which section 1(4) was designed to cure) could be raised as a bar. It is entirely typical that the employees of a related company will not be union members, for it is the creation of job opportunities ostensibly beyond the scope of the collective agreement, which constitutes the "erosion" of the union's bargaining rights. But for the creation of a separate vehicle, the work opportunities associated with the related business activity, and the conditions of employment of the employees engaged in that activity, would be regulated by the collective agreement. The very purpose of section 1(4) is to ensure that the union's bargaining rights and the scope of the collective agreement will not be restricted simply because an employer chooses to expand through a new corporate vehicle rather than its existing one.

While there are certain factual differences between the *A & P* case and the present, in our view the principle remains the same: the wishes of the employees of the related entity will be a factor, but only a factor, to be considered by the Board in the exercise of its discretion. In our view, given the circumstances outlined above, it is a factor which ought not to be accorded decisive weight.

40. The Board therefore finds and declares that the responding parties are one employer for the purposes of the *Act*. At the time this case was heard, Federal Pioneer had a number of manufacturing operations in Ontario. In light of this fact, and given the focus of the parties' case, the declaration will be restricted to the warehouse operations at Caravelle Drive.

1709-93-R Canadian Union of Public Employees and its Local 2451, Applicant v. Marriott Corporation (at Carleton University), Responding Party

Bargaining Unit - Combination of Bargaining Units - Union seeking to combine existing full-time and part-time bargaining units - Possibility that Board's decision may enhance union's bargaining power entirely speculative and posing no threat to viable and stable collective bargaining - Board directing that bargaining units be combined

BEFORE: *Russell G. Goodfellow*, Vice-chair, and Board Members *J.A. Rundle* and *E. G. Theobald*.

APPEARANCES: *Fancy Rosenberg*, *Norman MacKenzie*, *Larry Wong* and *Alain Belanger* for the applicant; *David Cowling*, *A. J. Grimard* and *Yvon Langlois* for the responding party.

DECISION OF RUSSELL G. GOODFELLOW, VICE-CHAIR AND BOARD MEMBER E.G. THEOBALD; February 9, 1994

1. This is an application for a combination of bargaining units pursuant to section 7 of the *Labour Relations Act*. The union, or its predecessor, has represented a unit of the respondent's full-time food service employees since 1980, and a unit of part-time food service employees since 1987.
2. On the basis of the evidence and submissions of the parties the Board is satisfied that a combination of bargaining units will reduce fragmentation and facilitate viable and stable collective bargaining, at least to some extent, without causing serious labor relations problems. The Board's decision is in keeping with its preference for broader based bargaining as a means of enhancing administrative efficiency and convenience, lateral mobility, a common framework of employment conditions and the promotion of industrial stability: See *Mississauga Hydro-Electric Commission*, [1993] OLRB Rep. June 523.
3. The Board is not persuaded on the evidence, and in light of section 6(2.1) of the Act, that any differences alleged in the community of interest of the two groups should lead to a different result. Both groups perform substantially the same work under substantially the same conditions. The fact that the part-time group is almost entirely made up of university students with more frequent turnover than the full-time group creates no obstacles to the ability of the two groups to bargain together.
4. Moreover, the possibility that the Board's decision may enhance the union's bargaining power, as the employer suggests, is entirely speculative and poses no greater threat to viable and stable collective bargaining than the present arrangement. It is also not the kind of "serious labour relations problem" to which section 7(3) is addressed. Likewise, the fact that some or all of the respondent's competitors may not operate with similar bargaining structures is not a factor which the Board deems "appropriate" to consider under section 7(3).
5. Both bargaining units are subject to existing collective agreements. The full-time agreement expires on August 31, 1994. The part-time agreement expires on February 28, 1995. In light of the fact that the part-time agreement was concluded while this application for combination of bargaining units was pending, the Board does not consider it appropriate at this time to direct an early termination of that agreement as requested by the applicant.

6. The Board therefore directs that the applicant's bargaining units be combined, and will remain seized to deal with any further remedial relief.

DECISION OF BOARD MEMBER J.A. RUNDLE; February 9, 1994

1. With reluctance I concur. It seems to me that in the absence of any real labour relations difficulties created by the present arrangement, the primary purpose of the present application is to enhance the union's bargaining power. Unfortunately, given the language of Section 7 and the state of the Board's jurisprudence to date, (*Mississauga Hydro-Electric Commission*, [1993] OLRB Rep. June 523.) this does not appear to be a factor that the Board is prepared to consider

2191-92-R; 2192-92-R; 2193-92-R United Brotherhood of Carpenters and Joiners of America, Local 18, Applicant v. Stewart & Hinan Contractors Limited, Stucor Construction Ltd., David J. Harvey, Dennis R. Kowalchuk and Vernon R. Thorpe c.o.b. as **Merit Contractors of Niagara**, Responding Parties; Labourers International Union of North America, Local 837, Applicant v. Stewart & Hinan Contractors Limited, Stucor Construction Ltd., David J. Harvey, Dennis R. Kowalchuk and Vernon R. Thorpe c.o.b. as **Merit Contractors of Niagara**, Responding Parties; International Union of Operating Engineers, Local 793, Applicant v. Stewart & Hinan Contractors Limited, Stucor Construction Ltd., David J. Harvey, Dennis R. Kowalchuk and Vernon R. Thorpe c.o.b. as **Merit Contractors of Niagara**, Responding Parties

Construction Industry - Sale of a Business - Applicant union submitting that certain alleged "key persons" were so essential to business of "predecessor" that their departure to form new "successor" company constituted sale of business within meaning of section 64 of the Act - Board finding that alleged "key persons" not in fact "key" to business of "predecessor" - Applications dismissed

BEFORE: G. T. Surdykowski, Vice-Chair, and Board Members F. B. Reaume and H. Kobryn.

APPEARANCES: L. Steinberg and Konrad Kott for Carpenters Local 18; L. Steinberg, Paul Setimi and Nick Scibetta for Labourers 837; L. Steinberg and Jim Anderson for Operating Engineers Local 793; David C. Daniels for Merit Contractors, Vernon Thorpe, David Harvey and Dennis Kowalchuk; no one appearing on behalf of Stewart & Hinan Contractors Limited or Stucor Construction Ltd.

DECISION OF THE BOARD; February 15, 1994

1. In these applications as filed, the respective trade union applicants asserted that there has been a sale of business, within the meaning of section 64 of the *Labour Relations Act*, by Stewart & Hinan Contractors Limited, and/or Stucor Construction Ltd. to David J. Harvey, Dennis R. Kowalchuk and Vernon R. Thorpe c.o.b. as Merit Contractors of Niagara. The applicants requested that the Board declare that the responding parties are all bound by their respective provincial agreements in the industrial, commercial and institutional sector of the construction indus-

try in Ontario. Further, or in the alternative, the trade union applicants alleged that the responding employers constitute one employer within the meaning and for the purposes of the *Labour Relations Act* (section 1 (4)), and requested that the Board so declare, and, further, that the Board declare that the responding employers are therefore *all* bound by the applicants' respective industrial, commercial and institution provincial agreements.

2. At the conclusion of the evidence, but prior to argument, the applicants withdrew their applications under section 1 (4) of the Act.

3. Upon hearing the representations of counsel for the applicants, the Board dismissed the section 64 applications in a brief oral ruling.

4. The applicants approached the section 64 applications as a "key man" (perhaps more appropriately "key person") case. That is, the applicants submitted that David J. Harvey, ("Harvey"), Dennis R. Kowalchuk ("Kowalchuk") and Vernon R. Thorpe ("Thorpe") were so essential to the business of Stewart & Hinan Contractors Limited/Stucor Construction Ltd. ("Stewart & Hinan/Stucor") that their departure to form Merit Contractors of Niagara ("Merit") constituted a transfer of part of the Stewart & Hinan/Stucor business to Merit, which transfer is a sale of business within the meaning of section 64 of the *Labour Relations Act*.

5. The applicants argued that the evidence established Stewart & Hinan/Stucor and Merit have obtained, and continue to obtain, most of their business by submitting bids in response to public or invited tenders. They submitted that the essence of a bid-oriented business lies in the expertise of its management; that is, that the success of the business depends on the ability to correctly estimate jobs and then execute them within the limits of the bid tendered. The applicants submitted that in the case of Stewart & Hinan/Stucor, this business essence rested in Harvey, Kowalchuk and Thorpe so that when they left to form Merit the business essence was in effect transferred from Stewart & Hinan/Stucor to Merit and constitutes a sale of a business within the meaning of section of the Act.

6. Section 64 of the *Labour Relations Act* is commonly known as a "successor employer" or "sale of business" provision. In *Pinecrest-Queensway Health and Community Services*, [1992] OLRB Rep. Nov. 1211, the Board described the purpose and effect of section 64 (and of section 1(4) a related provision) as follows:

...

6. Section 1(4) applies to situations in which activities which generate employment relations governed by the *Labour Relations Act* are carried on through more than [one] legal entity, whether or not at the same time. This provision gives the Board the power to pierce the corporate veil and declare two or more entities to constitute one employer for purposes of the Act where the Board is satisfied that they are engaged in associated or related activities under common direction or control. In that respect, section 1(4) modifies traditional common-law notions which are based upon the separation between legal entities and the privity of contract. It is a remedial provision intended to prevent the intentional or incidental frustration or erosion of established bargaining rights consequent upon changes in the structure or form of what is, for labour relations purposes, a single business or activity. To put it another way, whatever separation may exist between two or more entities for corporate, tax or other purposes, the Board is entitled to treat them as being one employer for labour relations purposes if they carry on associated or related activities under common control or direction. The purpose of section 1(4) is to protect the bargaining rights of a trade union and the rights of employees to bargain collectively with their employer through that trade union from being undermined by the form, or an alteration of the form, of a business or activity. In applications under section 1(4), the Board is concerned with the functional relationship between entities. Businesses or activities are "related" or "associated" because they are of the same character, serve the same general market, employ the same

mode or the means of production, utilize similar employee skills, or are carried on for the benefit of related principals (see, for example, *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 and October 1353). Where the Board is satisfied that two or more entities carry on associated or related activities or businesses under common control or direction, which may but does not necessarily include control over employees, the Board may declare that those entities constitute one employer for purposes of the *Labour Relations Act*. The effect of such a declaration is that the affected entities share the rights and obligations of an employer under the Act and any applicable collective agreement.

7. Section 64 has the same purpose and a similar effect. Like section 1(4), it recognizes that a “business” is a concept which does not lend itself to precise definition. Rather, a business is an economic activity (whether for profit or not) which can be conducted through a variety of legal vehicles or arrangements. It is the activity, not its form, which give rise to employee-employer relationships which are regulated by the Act and to which bargaining rights attach. Consequently, under the *Labour Relations Act*, bargaining rights attach to an activity as an employer rather than to a particular employer name or form of employer, and so long as that activity continues bargaining rights continue to exist. As in section 1(4), common-law or commercial law concepts have limited application to section 64 applications. Indeed it is those very concepts which led to the problems which the two provisions are intended to remedy.

8. The term “business” is not limited to a commercial or profit making activity. Sections 1(4) and 64 apply equally to traditional commercial activity and to municipalities, school boards, hospitals and other non-profit undertakings which have employees. It is the labour relations aspect of a “business” which is the focus of sections 1(4) and 64. In that respect, it is the continuity of the “activity” which is significant. “Business” is not necessarily synonymous with a particular group or kind of employees or the “work” they perform. Concomitantly, bargaining rights do not necessarily attach to particular work or employees. Although a continuity of work may be significant, it is not always sufficient to justify a finding that two or more entities constitute one employer, or that there has been a sale of a business. The focus of the inquiry under both section 1(4) and section 64 is the total economic organization, not just the employees or the work performed (see *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193; *British American Bank Note Co.*, [1979] OLRB Rep. Feb. 72; *Kitchener-Waterloo Hospital*, [1991] OLRB Rep. Oct. 1130).

9. The purpose of sections 1(4) and 64 of the *Labour Relations Act* is to preserve established bargaining rights, not to extend them or to create bargaining rights where there were none. ...

Earlier, in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193, the Board wrote that:

...

33. There need not be a transfer of the entire business before section [64] comes into play. The successor rights provisions may also be triggered by the transfer of “part of a business.” [See section 64(1).] This language suggests that bargaining rights continue when something considerably less than “the totality of the undertaking” has been transferred. Presumably the Legislature envisaged the preservation of bargaining rights where there is a severance and transfer of a discrete, cohesive portion of the economic organization or activities which comprise the totality of “the business.” The Board has found a transfer of “part of a business”, where one of a chain of retail stores has been sold to a competitor (*Supercity Discount Foods*, [1979] OLRB Rep. Apr. 119; *Loblaws Groceries Ltd.*, [1973] OLRB Rep. Jan. 73); where there is a transfer of the right and means to produce one of the products formerly produced by the predecessor’s business; (*Canac Shock Absorbers*, [1973] OLRB Rep. Oct. 508); where there was a transfer of certain milk delivery routes in a particular geographic area (*Borden Co. Ltd.*, [1970] OLRB Rep. Jan. 1244), and where there was a transfer of the oil burner installation and service branch of a firm which was primarily engaged in the sale and delivery of fuel oil (*Automatic Fuels Ltd.*, [1971] OLRB Rep. May 515.) In each of these cases the Board found that the predecessor had transferred a coherent and severable part of its economic organization - managerial or employee skills, plant, equipment, “know how” and goodwill - thereby allowing the successor to serve the market formerly served by the predecessor. This economic organization undertook activities which gave rise to employment, and the terms of employment, together with the union’s right to bargain about them, were preserved. The part of the predecessor’s business which it no longer

wished to continue provided the business opportunity which the successor was able to pursue to its own advantage. It was otherwise in *Woodway Structural Components*, [1971] OLRB Rep. Nov. 732, *Canada Cement LaFarge Ltd.*, [1975] OLRB Rep. Dec. 905, and *Dufferin Steel*, [1976] OLRB Rep. Mar. 81. In these cases there was a significant change in the character of the work, product or market so that the Board concluded that what had been transferred was not the predecessor's business. The successor had merely incorporated incidental elements of that business into his own economic organization - even though each of the elements acquired could previously be found in the predecessor's business organization and, in that sense, were "part" of the predecessor's business. What was transferred lacked that dynamic quality which distinguishes an idle collection of surplus assets from an active, severable and coherent part of a going concern.

34. This distinction is easily stated, but the problem is, and always has been, to draw the line between a transfer of a "business", or "a part of a business" and the transfer of "incidental" assets or items. In case after case the line has been drawn, but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue will be decided. Thus, an apparent continuity of the business may not be significant if the alleged successor has already been engaged in a similar business, or has set up a "new" business which resembles the "old" one in many respects. In *Ralph Ford Electrical*, [1974] OLRB Rep. June 388, for example, several key employees of the alleged predecessor became dissatisfied and struck out on their own in competition with their former employer. In that case the Board found that there was not a transfer of a business, but rather the creation of a new "parallel" business which only incidentally made use of some of the tangible elements of the predecessor's business organization. Similarly, in *Sunnybrook Food Mkt.*, [1974] OLRB Rep. Jan. 47 the continuation of a grocery business on the same premises, and with some of the same fixtures, was not enough to support a successorship finding. the Board was not satisfied that there had been a transfer and continuation of the *predecessor's business* (i.e., the business that he *owns and operates*) but simply the continuation of a like business. It is recognizable that so long as there is a market for a product, some entrepreneur is likely to appear who will produce for that market and, in so doing, he may share many of the characteristics of his alleged predecessor.

(See also, *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 and October 1353, and *Kepic Wrecking Inc.*, [1993] OLRB Rep. June 516.)

7. The Board has indeed recognized the importance of estimating and project management expertise to the success of a bid oriented business (see, for example, *Gallant Painting*, [1991] OLRB Rep. Sept. 1051, *Deluxe Electrical Contractor Ltd.*, [1990] OLRB Rep. Nov. 1135; *Stucor Construction Ltd.*, [1987] OLRB Rep. Apr. 614; *Construction P.H. Grager Inc.*, [1985] OLRB Rep. Feb. 233).

8. Further, the Board has recognized that there are individuals who are so important to a business that they are in effect the personification of the business or some significant aspect of it. In other words, they are the "key" to the business or some part of it such that they, in effect, take it with them if they move elsewhere.

9. For example, in *Construction P. H. Grager Inc.*, *supra*, the principals of two companies merged their construction businesses into one. One brought his expertise and the other his money to the merged business (the participation of a third partner was not material). Both pre-existing companies stopped operating. In concluding that there had been a sale of business in the form of the expertise of the principal of the unionized company to the merged company, the Board held that:

...

10. In this case the new company acquired virtually none of the physical assets of Pierre A.

Gratton Construction Inc. As the Board has noted in the past, however, the essence of a "business" in a bid-oriented sector of the construction industry frequently resides in the experience and expertise of its management personnel, rather than for example, in physical assets such as tools or a specific location. See, e.g., *Carroll Electric (1982) Limited*, [1982] OLRB Rep. Dec. 1814 at paragraph 11; *Jen-ry Utility Contracting*, [1984] OLRB Rep. Dec. 1724. And it was precisely these critical elements that Mr. Gervais looked to Mr. Gratton to provide -- so much so that he was prepared to offer Mr. Gratton an equal interest in the profit of the company that Mr. Gervais was 100 per cent financing. And, in return, Mr. Gratton had to commit himself to put his own company "on the shelf", and not to compete with the "Grager" company in any way. Mr. Gratton, in other words, agreed for good and valuable consideration to fold the business that he had developed and was operating as Pierre A. Gratton Construction Inc. into the new company incorporated under the name of Construction P.H. Grager Inc. The choice of name for the new company accurately reflects the "joint venture" aspect of the newly-created organization, but to put that label on the situation does not, in our view, fully answer the question of a "sale". While the roles played by Mr. Gervais and Mr. Vandal in the efficient operation of the new company ought not to be denigrated, neither, on the evidence, had developed a track record as general contractors which would qualify them as an arguable source of the "Grager" work. Combining the dominance, therefore, in "Grager" of the experience and expertise of Mr. Gratton (being the chief assets of Pierre A. Gratton Construction Inc.) in successfully acquiring work, with the agreement of Mr. Gratton to leave Pierre A. Gratton Construction Inc. "on the shelf" and carry on business only as Construction P.H. Grager Inc., the Board does not see this case as a simple "joint venture", in the way in which those words are often used. While, as the Board has stated on numerous occasions, the "related" and successorship provisions of the Act are not designed to multiply the number of discreet business undertakings to which a trade union's bargaining rights attach, it would not seem inappropriate that one or the other of those sections operate to preserve those rights in connection with what we find on the facts is essentially a continuation of the unionized "Gratton" business, at least during the period that "Gratton" itself remains inactive.

10. In *Stucor Construction Ltd.*, *supra*, the Board determined that there had been a sale of part of the business of Stewart & Hinan Contractors Limited, to Stewart & Hinan Corp. operating as Stucor Construction Ltd. (and hence our use of the label "Stewart & Hinan/Stucor" herein). In making that determination, the Board held that:

17. Against that background, the Board cannot agree with respondent counsel that the particular manner in which Contractors was liquidated precludes the Board from finding that there has been a sale of its business, or part of it, to Stucor. For similar reasons, the Board disagrees with applicant counsel that the reason why the prior business ceased is irrelevant to whether there has been a section [64] sale. Clearly, these are factors which the Board must weigh and, if nothing else, they may properly influence how the Board interprets the evidence before it and the inferences it will draw from the factual context of a particular case. This particular case is one where both the predecessor employer and its alleged successor carried/carry on a general contracting business, primarily in the industrial, commercial and institutional sector of construction. They obtained business by being the successful bidder in either public or invited tender situation. As the board commented at paragraph 10 of *P. H. Grager, supra*, "... the essence of a 'business' in a bid-oriented sector of the construction industry frequently resides in the experience and expertise of its management personnel, rather than, for example, in the physical assets such as tools or a specific location". This is because, to be financially successful, the business needs not only the ability to price and bid jobs successfully, but it must be able to execute the jobs within the self-imposed limits of the bid price. If it lacks expertise in either element, it is unlikely to be successful. Stucor, at its onset, obtained persons who had a proven track record with Contractors and, of course, Stewart knew precisely the quality of the skills he was getting. Kowalchuk and Thorpe provided Stucor with the expertise in estimating what a job would cost. If a job was successfully bid, Harvey, as manager of field operations in both businesses, had the overall expertise for organizing the materials, equipment and manpower to execute the job pursuant to the bid price. He also held the expertise to deal with the labour relations requirements of the business. VandeLarr provided the specialist skills of a project co-ordinator to see that these elements came together as planned and within the terms of the business contract with the client.

...

19. In the instant case, *in addition to acquiring the experience and expertise of the four persons named above, Stucor got the experience and expertise of Stewart who gives direction to how the others' talents will be used by the business and who brings with him the ability to attract business and expertise in how to package job bids in order to do so.* Stucor also acquired some of Contractors' fixed assets useful to a general contracting business, office furniture and fixtures, the use of its telephone system, and it operated its business out of part of the premises from which Contractors had operated its business. Furthermore, for the first two and one-half years, Stewart's new corporation benefited from the use of the name "Stewart & Hinan" for the conduct of its business. In short, the elements of Contractors' business which were transferred to Stucor and are identifiable in its business were sufficient to enable Stucor to begin immediately to carry on substantially the same kind of general contracting business, although scaled down in size, involving performance of the same kinds of jobs and in the same market as had been the case with Contractors.

[emphasis added]

11. In *Deluxe Electrical Contractor Ltd.*, *supra*, the sole proprietor of one company closed it down and became an equal partner in a company which operated a parallel business for approximately one year, and to which he had given business advice during that year. In finding that there had been a sale of the business, the Board held that:

17. Deluxe and Duplex operated parallel electrical contracting businesses for approximately one and a half years while Capretta and D'Alessandro were equal partners in Duplex. When Capretta decided that he no longer wanted to engage in that type of business through Deluxe, he sold immediately to Duplex the tangible assets which had been used for the conduct of Deluxe's business. Approximately three months later, Duplex also acquired Capretta and with him his eighteen years experience in the electrical trade, along with the experience he acquired in running Deluxe's business. Duplex recognized the importance of that experience to it by paying Deluxe \$9,600.00. D'Alessandro testified that it was simply Capretta's availability to Duplex as a journeyman electrician that enabled Duplex to expand its business as quickly as it did, and not any expertise in bidding electrical work or his experience in the trade. It is noteworthy, however, that Capretta's first work for Duplex after joining it full-time in February 1988 was preparing bids together with D'Alessandro. There is no doubt that the trades skills which Capretta brought to Duplex could have been provided by any journeyman electrician of similar experience and skill. The extra benefit which Duplex got from Capretta, however, was his experience in applying those skills *as a proprietor of a business which operated in a bid-oriented market.* Most of the work which Deluxe had performed had been acquired on the basis of competitive bidding. Once Capretta joined Duplex, it began to compete successfully for work in a bid-oriented market. The degree of its success may be seen in the doubling of Duplex's sales revenues in its first complete year of business after Capretta joined Duplex.

18. The Board has commented before on the significance of management expertise in bid-oriented divisions of the construction industry. The Board put it this way in *Construction P.H. Grager Inc.*, [1985] OLRB Rep. Feb. 233 at paragraph 10:

..., the essence of a 'business' in a bid-oriented sector of the construction industry frequently resides in the experience and expertise of its management personnel, rather than, for example, in the physical assets such as tools or a specific location.

Furthermore, as the Board noted in *Stucor*, *supra*, that expertise is essential not just for bidding and pricing jobs, but also for executing the acquired jobs within the cost constraints of the bid. Capretta and D'Alessandro both played down Capretta's contribution in that respect, both in his advice giving capacity while he was still carrying on business as Deluxe as well as after he moved over to Duplex. It is to be noted, however, that D'Alessandro came to Capretta at Deluxe whenever he needed advice about the electrical code or about performing electrical work with which he was not experienced. That knowledge is important to both bidding and executing work and it was part of the experience for which Duplex paid \$9,600.00 to Deluxe. At that point, Duplex already had bought all of Deluxe's tangible assets and, with the addition of

Capretta, all of the significant resources which Deluxe had used to carry on business as an electrical contractor.

[emphasis added]

12. In *Ably Concrete Floor Ltd.*, *supra*, the four partners in a construction business shut down that business and joined a competitor. In concluding that this constituted the sale of business to the competitor, the Board held that:

• • •

16. In the instant application, the physical assets, even bearing in mind that Ably operated in the construction industry, are minimal. Yet no one would dispute that the four partners were operating a business in the form of a company, namely, Ably. What were the assets of Ably? In our view they were the skills, contacts and reputation of Willis Turner and, to a lesser degree, the three Houses. The evidence before the Board established that cement masons are not readily hired in London. Even rarer are individuals like the four partners - cement masons with skills, contacts and good reputations. It is clear from the evidence that, by hiring the four partners, Turner added to its customer base and eliminated a substantial competitor. This was done against a background of Ably's newly acquired relationship and obligations with the applicants over bargaining rights. The four partners may be thought of as key personnel and, in the context of this application, by acquiring the exclusive services these four key personnel there was a sale of a business from Ably to Turner within the meaning of section [64] of the *Labour Relations Act*. ...

13. In *Gallant Painting*, *supra*, the principal of a painting business closed it down and joined another company which wished to expand its business by adding a painting division. The Board found that Mr. Gallant was the "key man" to the pre-existing painting business, and that the other company had hired him for his connections, reputation and expertise in the painting business. In concluding that this constituted the sale of business within the meaning of the *Labour Relations Act*, the Board wrote that:

• • •

39. Included in the Board's jurisprudence under section [64] are a number of "key man" cases including those referred to by counsel for the applicant. None of the cases are particularly helpful as it is clear that each case generally turns on its own facts. Certainly there are a number of cases in which the movement of a key person to a new entity did not attract labour relations consequences pursuant to section [64] of the Act (see for example *Jen Ry Utility Contracting Co. Ltd.*, [1984] OLRB Rep. Dec. 1724, *Braneida Mechanical Service Ltd.*, [1981] OLRB Rep. Aug. 1102, *Rivard Mechanical*, [1981] OLRB Rep. May 550). Those cases are distinguishable from the facts and circumstances in this case. The facts before us are also distinguishable from the "key man" cases referred to by counsel for the applicant in which labour relations consequences did attach to the acquisition of the services of a key person by the successor employer. In each of the cases referred to by the applicant an additional factor was present. Thus in *Stucor Construction Ltd.*, *supra*, and *Deluxe Electrical Contractor Ltd.*, *supra*, the successor also acquired certain fixed assets and equipment from the predecessor. In *Construction P. H. Grager Inc.*, *supra*, the predecessor undertook not to compete with the successor and assumed an ownership role with the successor. In *Ably Concrete Floor Ltd.*, *supra*, (a case which most closely resembles the facts before us) the predecessor transferred work to the successor and the successor performed or completed existing contracts of the predecessor. In determining whether there was a "sale" of a "business" for purposes of the Act in this instance therefore we find it useful to briefly review the principles which underline the application and interpretation of section [64].

• • •

48. We find that at Gallant Painting the essential elements of the business resided with John Gallant. At Lindsay Maintenance, *for the Painting Division* these essential elements continue to

reside with John Gallant. In so finding we acknowledge that at Lindsay Maintenance, Jim Lindsay is the boss, the person with ultimate control. We also acknowledge that Jim Lindsay might have expanded his existing operations and entered into the painting maintenance business without John Gallant. Indeed the respondents have argued that Lindsay Maintenance merely extended or expanded its own parallel business. As indicated herein we do not accept that assertion.

49. Although it is true that Lindsay Maintenance might have started from scratch gradually building up the kind of skill, experience and expertise and knowledge enjoyed by Gallant Painting, it did not do so. Lindsay Maintenance might have hired someone with skills, know how and experience similar to those of Mr. Gallant to assist it as it slowly built up the business to the level of expertise and recognition enjoyed by John Gallant and Gallant Painting. The fact remains however, that it did not do so.

50. Lindsay Maintenance saw an opportunity when Gallant Painting suddenly ceased operations. As Mr. Lindsay testified he decided to take advantage of that opportunity. One way Lindsay Maintenance took advantage of the opportunity was by acquiring the skills and expertise of John Gallant. In so doing, Lindsay Maintenance also acquired the built-up experience, familiarity, reputation and personal contact of John Gallant and Gallant Painting.

• • •

57. The respondents also argued that the only thing that passed between the two corporate entities was John Gallant - a person who is a mere employee of the alleged successor Lindsay Maintenance in the same manner as the Lindsay Maintenance mechanical supervisors/foremen. We do not agree. Lindsay Maintenance didn't simply hire John Gallant. It acquired his expertise and reputation and used those to obtain the very things Gallant Painting previously had - the most important of which was a place of Nova's bid list and therefore the opportunity to bid upon Nova work.

58. In our view this is not simply an acquisition of a "key man" case for the facts taken in their totality disclose much more. Lindsay Maintenance acquired Gallant Painting's "goodwill" for any goodwill of that company came by reason of its owner John Gallant and the Gallant name. It acquired some of Gallant Painting's employees - those who apparently had previously worked at the Nova site. It occasionally borrowed equipment from John Gallant. It acquired one of Gallant Painting's two major customers. In this regard we are of the view that Lindsay Maintenance was not merely servicing its own existing customer. Rather it was put on this customer's bid list for maintenance painting work. It did not previously have a place on that bid list and had not previously done that type of work. Although Lindsay Maintenance may not have needed John Gallant to "introduce" it to Nova as a customer, it did need and use John Gallant to get its name on the maintenance painting bid list of that customer.

(emphasis supplied)

14. As the Board pointed out in *Gallant Painting, supra*, not every movement of a person significant to a business will constitute a sale of business within the meaning of the *Labour Relations Act*, or otherwise attract labour relations consequences. In that respect, the applicants were unable to point to any "key person" case in which the Board found a sale of business where the "key person" did not hold an ownership interest in the alleged predecessor or a vendor entity which subsequently ceased to operate. It is conceivable that an individual could be a "key person" and that a business could survive his/her departure. But however important a person may be to the operation of a business, s/he will not be a "key person" within the meaning of the Board's sale of business jurisprudence unless the business is substantially different without him/her. That is, for an individual to be "key person", s/he must be identified with a business or some significant part of it.

15. Much of the history material to these applications is set out in *Stucor Construction Ltd., supra*. The additional evidence in these proceedings threw further light on the respective roles of Harvey, Kowalchuk and Thorpe in Stewart & Hinan/Stucor.

16. Harvey, Kowalchuk and Thorpe were not “key” to the Stewart & Hinan/Stucor business. None of them ever held any ownership interest in or exercised any control over the business of Stewart & Hinan/Stucor (indeed, that is what prompted them to leave). Harvey, Kowalchuk and Thorpe did play an important role in the Stewart & Hinan/Stucor business in the sense that they performed functions crucial to its success, but they neither formed nor took any part of the business with them with they left to form Merit. As the *Stucor Construction Ltd.*, *supra*, decision suggests, and the evidence before the Board in this case confirms, the essence of the Stewart & Hinan/Stucor business resides in Robin Stewart himself. He controls it. He is the “key person” of that business. While the departure of Harvey, Kowalchuk and Thorpe undoubtedly had an impact on Stewart & Hinan/Stucor, that business continues to operate, apparently successfully, and apparently in much the same way as it did while Harvey, Kowalchuk and Thorpe were employed there. There was no suggestion to the contrary.

17. Further, while both Stewart & Hinan/Stucor and Merit operate bid oriented businesses, their “customers” and approach to business are quite different. Stewart & Hinan/Stucor has concentrated on industrial work and has obtained most of its work through the invited tender process. Merit’s focus is broader within the industrial, commercial and institutional sector and it obtains most of its work through the public tender process. This, and the fact that there is little overlap between their customer bases, indicates that Stewart & Hinan/Stucor and Merit are not really parallel businesses and demonstrates that whatever Harvey, Kowalchuk and Thorpe brought with them to Merit, it was not any part of the business of Stewart & Hinan/Stucor.

18. Finally, there was no indication that any of the applicants’ bargaining rights have been eroded.

19. In the result, the section 64 application was dismissed as aforesaid.

1945-93-R Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (CLC, AFL-CIO), Applicant v. Metroland Printing, Publishing and Distributing Ltd., Responding Party

Bargaining Unit - Combination of Bargaining Units - Remedies - Union seeking to combine newly certified editorial bargaining unit in Simcoe County with existing bargaining unit covering various locations including Metropolitan Toronto - Employer submitting that should Board grant union’s application, Board should direct freeze of terms and conditions of Simcoe employees and Board should not remain seized of further outstanding issues - Board directing that bargaining units be combined and remaining seized to deal with any further remedial relief

APPEARANCES: Kathleen Martin, Paul Pellettier and Stan Howe for the applicant; Douglas K. Gray, Sarah A. Eves, Brenda Biller and Joe Anderson for the responding party.

BEFORE: Russell G. Goodfellow, Vice-Chair, and Board Members W. H. Wightman and K. Davies.

DECISION OF THE BOARD; February 15, 1994

1. This is an application for a combination of bargaining units pursuant to section 7 of the *Labour Relations Act*.

2. The application was heard together with an application for certification in Board File No. 1944-93-R. By decision dated November 17, 1993 the Board certified the applicant to represent the following unit of the respondent's employees:

all editorial employees of Metroland Printing, Publishing and Distributing Ltd. in Simcoe County save and except the Publisher, the Editor in Chief, and the News Editor at the *Barrie Advance*, save and except those employees covered by an existing collective agreement as at September 14, 1993.

3. The applicant seeks to have this unit combined with the following existing bargaining unit:

all editorial employees of Metroland Printing, Publishing and Distributing Ltd., in the Municipality of Metropolitan Toronto, the Regional Municipalities of Halton, Peel, York and Durham, the Township of West Gwillimbury, all editorial employees at *Erin Echo* and *Rockwood Review*, save and except, the Publisher of each newspaper, the Editors in Chief at each of *Newmarket/Aurora Era-Banner* and *Richmond Hill/Thornhill/Vaughan Liberal*, *Oshawa Whitby This Week* and the *Ajax/Pickering News Advertiser*, *Brampton Guardian* and *Georgetown Independent/Acton Free Press*, *Etobicoke Guardian/North York/Scarborough Mirrors*, *Markham Economist and Sun/Stouffville Tribune*, the Director of Editorial at the *Mississauga News*, the Editors at the *Ajax/Pickering News Advertiser*, *Burlington Post*, *Brampton Guardian*, *Markham Economist and Sun*, *Stouffville Tribune*, *Milton Canadian Champion*, *Oakville Beaver*, *Oshawa/Whitby This Week*, *Richmond Hill/Thornhill/Vaughan Liberal*, *Today's Seniors*, the Managing Editors at the *Era-Banner/Newmarket*, the *Era-Banner/Aurora*, the *Era-Banner/Georgina*, *Scarborough/North York Mirrors*, *Etobicoke Guardian*, *Mississauga News*, *Richmond Hill/Thornhill/Vaughan Liberal*, *Georgetown Independent/Acton Free Press*, the Associate Editor at the *Oakville Beaver*, News Editors at *Oshawa/Whitby This Week*, *Burlington Post*, *Acton Free Press/Georgetown Independent*, and Chief Photographers at *Mississauga News*, *Burlington Post* and *Oshawa/Whitby*, *Ajax/Pickering* and persons who exercise managerial functions or who are employed in a confidential capacity in matters relating to labour relations within the meaning of the *Ontario Labour Relations Act*.

4. The applicant also requests that the Board leave it to the parties, in the first instance, to attempt to resolve any issues arising out of the Board's order, with the Board remaining seized to resolve any difficulties. If the Board is unwilling to remain seized, the applicant requests that the Board amend the scope and recognition clause of the collective agreement to include the newly certified "Simcoe employees".

5. At the hearing, the respondent was prepared to consent to the combination order *provided* the Board: (i) did not remain seized to deal with any further remedial relief; (ii) directed a freeze on the terms and conditions of employment of the newly certified group; and (iii) determined that the applicant has no remaining right to first contract arbitration. If the Board was unwilling to do so, the respondent submitted that the application should be dismissed. The basis for the respondent's position was that the parties were in the open period under the collective agreement and, with bargaining likely about to begin, the parties should be afforded the widest possible leeway to sort out the effects of the combination order on the two groups. Otherwise, there would be two or more "tracks" of dispute resolution, with uncertainty as to the scope of each. In the respondent's view, this would do little to promote viable and stable collective bargaining and would cause serious labour relations problems within the meaning of section 7(3).

6. Subsequent to the hearing, the Board received a series of letters from counsel for the parties. By letter dated December 8, 1993 counsel for the respondent wrote:

It has come to our attention that the Guild apparently elected not to serve notice to bargain in connection with the potential renewal of the collective agreement. Accordingly, it is automatically renewed for a period of one year expiring December 2, 1994.

This will reiterate the Company's position argued at the hearing that the Company would wish to have an opportunity to negotiate the terms and conditions of employment of the Simcoe employees. We wanted the Board to be aware of this new information which was obviously not available at the hearing, in coming to its decision.

7. Applicant's counsel replied by letter dated December 17, 1993, which states in part:

As the Board is aware, the collective agreement in respect of the existing Metroland bargaining unit has been automatically renewed for a period of one year expiring on December 2, 1994.

As a result of this situation, it is the Union's position that the premise of the Employer's position argued at the hearing has been totally undermined. As the Board will recall, the Employer took the position that the Board should not remain seized in this matter because the parties were about to commence collective bargaining and accordingly, the Board should merely let collective bargaining take its normal course. In the course of its argument, the Employer distinguished the instant case from an earlier decision of the Board in *Premark Canada Inc.*, [1993] OLRB Report, June 540, on the basis that in *Premark* the Board had only remained seized because the collective agreement ran until 1995.

As a result of the automatic renewal of the existing Metroland collective agreement until December 2, 1994, the instant case is now indistinguishable from the Board's decision in *Premark Canada Inc.*, *supra*. The Union therefore submits that the Board should follow the *Premark* decision and grant the combination order, refer the matter back to the parties, and remain seized with respect to any further remedial relief.

We reiterate the Union's position that should the Board accept the Employer's argument not to remain seized, then the Board should order that the employees covered by the editorial unit in Simcoe County be rolled into the existing collective agreement (which now expires December 2, 1994), and that, henceforth, all their terms and conditions of employment should be governed by that collective agreement.

8. The respondent's reply to this letter is dated December 23, 1993:

In view of the union's election to not give notice to bargain, it is the Company's position that the Board should do one of the following, in order of preference:

1. dismiss the combination application;
2. grant the combination application; order a freeze of the terms and conditions of the Simcoe employees until the right to strike or lock-out arises or the parties otherwise agree, whichever occurs first; and not remain seized of any further outstanding issues; or
3. grant the combination application and remain seized of any issues that the parties cannot resolve themselves.

We will not repeat the arguments made at the original hearing. It has been the Company's position throughout, and it remains the Company's position, that the Board should make an order that has the least impact on the bargaining process, and allows the parties to bargain the terms and conditions of employment of the Simcoe employees with a minimum of interference.

The Company has made the submission, and we will not repeat it here, that if the application is granted, there is no longer any "first collective agreement" that gives rise to any right to first contract arbitration.

If the first option is selected, the parties can bargain their own collective agreement for the Sim-

coe employees, and the trade union can exercise its right to first contract arbitration if so advised.

If the second option is selected, the parties can bargain the terms and conditions of the Simcoe employees; if they do not arrive at an agreement, the status quo will prevail until the negotiation of a new collective agreement.

If the third option is selected, the Board will be in the position of acting as an interest arbitrator if the parties cannot agree on terms and conditions of employment for the Simcoe employees. For all of the reasons advanced at the hearing, which I will not repeat, this is not a desirable alternative.

In the result, it is the Company's position that nothing has materially changed as a result of the union's election not to give notice to bargain.

9. The correspondence concludes with a letter from the applicant dated January 6, 1994, which states in part:

Firstly, we note that the Employer appears to have changed the order of its proposed disposition of the combination application. At the conclusion of the Employer's argument at the hearing in this matter, we understood the Employer's first position to be that the Board should grant the combination application, order a freeze of the terms and conditions of the Simcoe employees and that, only in the alternative, should the Board dismiss the combination application. We note that the Employer has now reversed the order of its disposition of the combination application, notwithstanding its assertion that nothing has materially changed as a result of the automatic renewal of the collective agreement.

In addition, in response to the Employer's assertion that nothing has been changed by the automatic renewal of the collective agreement, the Union reiterates that the fact of the renewal has significantly undermined the Employer's argument in respect of its second option as outlined in its letter dated December 23, 1993. As the Board has stated in *Pemark*, following the granting of a combination order, there can be only one collective agreement. Therefore, although the parties can seek to bargain the terms and conditions applicable to the Simcoe County employees, there can be no access to a strike or lock-out until the expiry of the current collective agreement, i.e. December 3, 1994. In addition, under the Employer's scenario, the parties would not have access to first agreement arbitration; a position which the Union disagrees with but which if correct, would result in there being no formal mechanism available to the parties to facilitate a settlement. In the result, the bargaining process and the ultimate settlement of the terms and conditions of employment applicable to the Simcoe County employees may be significantly delayed until after December 3, 1994.

Moreover, in the event that bargaining is delayed, the Union may become vulnerable to a termination application under section 58 of the *Act*, since there is a risk that a collective agreement involving terms and conditions applicable to the Simcoe County employees will not be concluded one year after the certification.

In sum, should the Board adopt the Employer's second option, there is the potential for excessive delay in the finalization of a collective agreement. It is submitted that such a scenario clearly offends the purposes of the *Act* to promote, *inter alia*, harmonious labour relations, industrial stability and the ongoing settlement of differences between employers and trade unions and to provide for effective, fair and *expeditious* methods of dispute resolution. As well, it offends the particular provisions of the *Act* which are designed to expedite the certification and first agreement process. Accordingly, it is submitted that the Board should reject the Employer's argument and instead should follow its existing jurisprudence to grant the combination order, refer the matter back to the parties, and remain seized with respect to any further remedial relief.

10. It appears from the parties' correspondence that the factual sands have shifted somewhat since this matter was heard. Where once the existing group was about to be in bargaining for a renewal agreement, now it is subject to a collective agreement which does not expire for another

nine months. Since much of the respondent's evidence and argument was predicated on its understanding of the impending facts, this development does nothing to assist its case. The respondent can no longer rely on the assertion that the "normal" bargaining process ought to be allowed to take its course in respect of all issues. Having said that, however, the Board is not satisfied that the respondent's arguments can be disposed of solely by reference to the decision in *Premark Canada Inc.* [1993] OLRB Rep. June 540, as submitted by the applicant.

11. In *Premark*, the employer argued, among other things, that a combination order ought not to be granted because it would render the newly certified group subject to the terms and conditions of employment set out in the collective agreement applicable to the existing group. It was argued there, as here, that the Board should use its combination power in such a way as to interfere with the collective bargaining process as little as possible. To the employer in *Premark*, this meant that a combination order should not be granted if it would deprive the parties of the opportunity to bargain the terms and conditions of employment of the newly certified group.

12. The Board rejected this argument on the basis that it proceeded from a faulty assumption *viz.* that an order combining a newly certified group with an existing bargaining unit meant that the former group would automatically become subject to the latter's collective agreement. This is not the case. Without an accompanying amendment to the scope and recognition clause of the collective agreement, there can be no argument that the newly certified group inherits the terms and conditions of employment set out in that agreement. In the result, the Board ordered the units combined, and left it to the parties to negotiate the consequences, with the Board remaining seized to resolve any difficulties.

13. In the present case, the applicant's request for an amendment to the scope and recognition clause of the collective agreement is framed in the alternative. Its primary position is that the units ought to be combined, with the Board remaining seized to resolve any difficulties. Despite the somewhat greater flexibility in bargaining this would seem to provide, the respondent is nevertheless concerned that the Board's seizure power or the possibility of a continuing right to first contract arbitration might be used to displace the normal methods for resolving collective bargaining disputes. The respondent then seeks to locate these concerns (which, in theory at least, do not depend upon the timing of the combination order in relation to the expiry of the existing collective agreement) within paragraphs (b) and (c) of subsection 7(3) of the Act. This provision states:

7. (3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,

- (a) would facilitate viable and stable collective bargaining;
- (b) would reduce fragmentation of bargaining units; or
- (c) would cause serious labour relations problems.

14. In the Board's view, these concerns do not provide a sufficient basis for denying the combination order or for causing the Board to depart from its developing practice of leaving it to the parties, in the first instance, to bargain about the consequences of the Board's order, with the Board remaining seized to resolve any difficulties.

15. Section 7(5) of the Act states:

7(5) In combining bargaining units, the Board may amend any certificate or any provision of a collective agreement and may make such other orders as it considers appropriate in the circumstances.

In the cases that have been dealt with by the Board to date, it has generally held the power conferred by section 7(5) in abeyance pending efforts by the parties themselves to bargain about the consequences of the combination order in accordance with their own timetable and interests. It is not apparent to the Board, nor is there any evidence to suggest, that retaining the jurisdiction that the statute expressly confers would cause serious labour relations problems or would not facilitate viable and stable collective bargaining.

16. Likewise, the possibility that there may continue to exist a right to first contract arbitration is a product of the interplay between the recent statutory amendments and the prior language. The result is not entirely clear. However, uncertainty as to the parties' respective legal and practical positions is a fact of life under any newly amended legislation. It is not a serious labour relations problem within the meaning of section 7(3); nor is the possibility of a continuing right to first contract arbitration a matter on which the Board is prepared to pronounce in the absence of a specific request on specific facts in a specific case.

17. Precisely to what extent the Board will choose to exercise the remedial jurisdiction conferred by section 7(5) and what issues are the appropriate subject matter of a request thereunder, remains to be seen. The point, however, is that the statute expressly recognizes that the parties ought to have some outlet for the resolution of differences arising from the combination order that differs from the existing dispute resolution mechanisms under the Act. For the Board to say as part of a combination order and without more, that it will not exercise this jurisdiction or that it will rely on the very existence of this power as a basis for denying the order, would frustrate this statutory purpose.

18. Finally, and even assuming that the Board has the power to direct a "freeze" on the terms and conditions of employment of the newly certified group, there is no basis for doing so on the facts of this case. To the extent that this request is founded on the concern that the newly certified employees may inherit the terms and conditions of employment set out in the collective agreement, it has been addressed above. If, on the other hand, it is intended to bring the process of bargaining the effects of the combination order within the same timetable as applies to the current agreement, there is no statutory or factual basis for any such delay.

19. In the result, and having regard to the criteria set out in section 7(3), the evidence and the submissions of the parties, the Board orders that the two bargaining units be combined. The Board will remain seized to deal with any further remedial relief.

2816-93-JD International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128; International Union of Operating Engineers; and International Union of Operating Engineers Local 793; The International Brotherhood of Teamsters; and The International Brotherhood of Teamsters, Chauffeurs and Allied Workers, Local 230; The International Association of Bridge Structural and Ornamental Ironworkers; The International Association of Bridge Structural and Ornamental Ironworkers, Local 736; The IBEW Electrical Power Systems Construction Council of Ontario representing the following affiliated Local Unions: 105, 115, 120, 303, 353, 402, 532, 586, 773, 804, 894, 1687, 1739 and 1788; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527, Applicants v. Electrical Power Systems Construction Association; Dominion Metal and Refining Works Ltd.; **Multidem Inc.**; Labourers' International Union of North America, Ontario Provincial District Council, and Labourers' International Union of North America, Local 1059, Responding Parties

Construction Industry - Jurisdictional Dispute - Boilermakers' union and other unions disputing assignment of work in connection with demolition and removal of inactive heavy water plant in circumstances where the materials/equipment/facility demolished for scrap - Board confirming assignment of work in dispute to Labourers' union

BEFORE: Inge M. Stamp, Vice-Chair, and Board Members W. N. Fraser and G. McMenemy.

DECISION OF THE BOARD; February 16, 1994

1. This is a jurisdictional complaint filed pursuant to section 93 of the *Labour Relations Act*. The Board held a consultation with the parties. Pursuant to section 93(1.2) of the Act, the Board may make any interim or final order it considers appropriate after consulting with the parties.
2. The work in dispute is the demolition and removal of the Bruce Heavy Water Plant A at Tiverton, Ontario. This plant has been inactive for some nine years.
3. Ontario Hydro sold the defunct plant (excluding the land) to Dominion Metal and Refining Works Ltd. (hereinafter referred to as "Dominion Metal"). Dominion Metal subcontracted the demolition work to Multidem Inc. (hereinafter referred to "Multidem"). The disputed work was assigned to the Labourers at a mark-up meeting.
4. All of the equipment, towers, heat exchangers, transformers, copper cables, piping, valves, vessels, motors, etc. are to be knocked down, demolished, cut-up and sold for scrap metal. None of the materials or parts are for reuse. The entire plant was sold for scrap metal. The cut-up sections are sorted by type of metal, i.e. stainless steel, carbon steel, copper, aluminium. No particular care, other than safety considerations, is required in taking down or demolishing this facility. This is quite different from dismantling equipment or components for salvage and/or reuse where the integrity of the components or the surrounding area needs to be maintained.

5. Based on the materials filed and *viva voce* evidence the Board is satisfied that the entire plant was sold for scrap to Dominion Metal. In these circumstances Ontario Hydro practice and the Electrical Power Systems Construction Association agreement clearly establish this work belonging to the Labourers. It is work performed by construction labourers. There is no requirement to protect the integrity of the facility or any of its components. Dominion Metal/Multidem, subject to safety requirements, can take down this plant any way it chooses.

6. Having considered the evidence and submission we confirm the assignment of the work in dispute to the Labourers. The Board would emphasize this work assignment is with respect to the Electrical Power Systems sector in circumstances where the materials/equipment/facility are being demolished for scrap.

1591-93-U National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 456, Applicants v. Partek Insulations Ltd., Responding Party

Continuation of Benefits - Practice and Procedure - Unfair Labour Practice - Reconsideration - Strike - Board determining that under section 81.1 of the *Act*, union entitled to tender payments for selected benefits - Employer directed to provide union with information respecting amounts necessary to continue benefits selected by union - Employer applying for reconsideration on ground that Board without jurisdiction to make its production order and on ground that Board was required to first determine whether union had tendered any payment before making any order or direction - Reconsideration application dismissed

BEFORE: *Judith McCormack*, Chair, and Board Members *W. N. Fraser* and *P. V. Grasso*.

APPEARANCES: *Lisa Kelly* and *Gerry Michaud* for the applicants; *Harry Freedman* and *Raeline Peseski* for the responding party.

DECISION OF THE BOARD; February 14, 1994

1. This is an application under section 91 of the *Labour Relations Act* alleging that the responding company violated section 81.1 relating to the continuation of benefits during a strike. On October 19, 1993, the Board issued a decision with respect to one of the matters in dispute, with reasons to follow. This decision contains both those reasons and addresses a subsequent application for reconsideration.

2. The responding company is a manufacturer located in Sarnia, and its employees are represented by the applicant union. The most recent collective agreement between the parties expired on June 15th, 1993 and on July 9th, employees commenced a legal strike against the company. Several days later, Gerry Michaud, a national representative for the union who is in charge of its strike department, sent a letter to the company as follows:

Re: Health Care and Life Insurance Benefits

Please be advised that for the duration of the labour dispute between your company and CAW-Canada and its Local 456, we wish to continue all of the following applicable benefits: life insurance, AD & D, survivor income benefit insurance, transition bridge, group medical/hospital

insurance, drug, out-of-province and medex (*excluding* dental, vision and hearing, or weekly disability premiums) to all eligible employees of your company who are members of the bargaining unit. Optional insurance coverage and rider policies will remain the responsibility of the member.

Upon a suitable invoice we will reimburse the company in full. Invoices should include full documentation of premium information and be submitted to my attention.

3. The company refused to provide such an invoice, however, as its position was that it would not continue just some of the benefits. Only if the union paid for *all* the benefits (except for weekly indemnity and long term disability) would the company continue *any* benefits. As a result, the only invoice it produced was for the full package of benefits (minus the two set out above). There were several letters and telephone calls between the parties in which the company maintained this position. The union also attempted to contact the insurer directly, who declined to discuss the matter. The company then cancelled the benefits and the union filed this application.

4. Section 81.1 provides as follows:

81.1-(1) This section applies with respect to employment benefits, other than pension benefits, normally provided directly or indirectly by the employer to the employees.

(2) This section applies only when it is lawful for an employer to lock out employees or for employees to strike.

(3) For the purpose of continuing employment benefits, including coverage under insurance plans, the trade union may tender payments sufficient to continue the benefits, to the employer or to any person who was, before a strike or lock-out became lawful, obligated to receive such payments.

(4) The employer or other person described in subsection (3) shall accept payments tendered by the trade union under that subsection and, upon receiving payment, shall take such steps as may be necessary to continue in effect the employment benefits including coverage under insurance plans.

(5) No person shall cancel or threaten to cancel an employee's employment benefits including coverage under insurance plans if the trade union tenders payments under subsection (3) sufficient to continue the employee's entitlement to the benefits or coverage.

(6) No person shall deny or threaten to deny an employment benefit, including coverage under an insurance plan, to an employee if the employee was entitled to make a claim for that type of benefit or coverage before a strike or lock-out became lawful.

(7) Subsections (4), (5) and (6) apply despite any provision to the contrary in any contract.

5. There are two main issues in dispute in this matter. First, the parties disagree about whether all the benefits must be continued under section 81.1 or whether the union may tender payments for only some of the benefits. Secondly, the company takes the position that the union did not actually tender any payments, and thus no violation of section 81.1 occurred. The union asserted in its application that the company violated the Act by preventing the union from tendering payments. At the hearing, counsel also maintained that the letter from Mr. Michaud set out above constituted a tender because it contained an attempt or offer to pay.

6. Counsel for the company was further of the view that the Board could not decide the issue of whether the company must continue selected benefits without deciding the second issue of whether the union tendered payments for the benefits in this case. We do not agree. Section 108(1) of the *Labour Relations Act* provides as follows:

108.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

7. The application before us alleges that the company violated section 81.1 of the Act. To determine whether such a violation occurred, there are a number of issues to be addressed, including the selection of benefits issue and the tender of payments issue. Neither is more fundamental than the other and neither is necessarily predicated on the other. A decision on either, depending on its contents, could be dispositive of the entire application. Similarly, a decision on either might also mean that a decision on other issues was then required. There is no reason to think that the Board must decide contested issues in a particular sequence in these circumstances. Our jurisdiction under section 108 extends to all questions of fact and law, and determining one issue and reserving upon another or deciding them in an order other than the one preferred by a party does not rob us of jurisdiction in this regard. Indeed, the Board does precisely this from time to time when it reserves on a matter defined as preliminary by a party, but which the Board is not inclined to decide in a preliminary way.

8. In this case, whether the employer has violated the Act depends on whether the union tendered payments sufficient to continue the benefits. Since it was not disputed that it had not tendered payments for all the benefits, we find it useful to decide first whether it was entitled to tender for selected benefits and then, if necessary, move on to the other issues.

9. Turning then to this first area of dispute, the language of section 81.1 does not provide us with much assistance. It is true that it does not refer to "all benefits"; however, neither does it refer to "any benefits". The wording, which is simply "the benefits", does not really provide us with interpretative clues one way or another with respect to this issue. Subsection (6) does make use of singular language, but in a manner which is not particularly enlightening.

10. In these circumstances, we find it useful to turn to the purpose of the provision. The evidence submitted by the parties in this regard consisted of a discussion paper issued by the government as part of the legislative process. In that paper, the reform proposal which eventually became section 81.1 is part of a cluster of six proposals addressing various strike or lockout related matters. These also include prohibitions on the use of replacement workers, the extension of just cause protection to employees during a dispute, the expansion of the right to return to work after a dispute, the provisions of picketing on third party property and the effect of "hot cargo" and picket line agreements. It is apparent that generally speaking, these proposals are intended to strengthen the position of employees during a strike or lockout.

11. In this context, the company argues that the union should not be permitted to select certain benefits for continuation for two reasons: first, the section could not have been intended to cost the company anything, and secondly, the legislative intent was to place economic pressure on the union which would be conducive to settlement. Counsel asserted that cancelling certain benefits but not others would result in subsequent premium increases, and that requiring the union to pay for all the benefits, whether employees wanted them or not would exert economic leverage on the union which would have a positive effect on labour relations disputes.

12. We heard considerable evidence with respect to whether the cancellation of certain benefits would in fact create costs for the company. The gist of this was that cancelling benefit coverage for a certain period of time and then resuming it might result in increased premiums for the following year. This was because premium income had been foregone during the strike, but claims

might not be reduced in the case of elective benefits such as a dental plan where employees could postpone appointments until after the strike. The result could be a shortfall which the insurer might attempt to recapture the following year. In this case, the company was running a shortfall in any event with respect to certain benefits, and was concerned that cancelling benefits would provide the insurer with an opportunity to revisit the premium rates.

13. The utility of this evidence is not particularly clear. It was apparent from the testimony provided that the company would be in essentially the same position whether all the benefits were cancelled or only a portion. In other words, this evidence does not support the company's contention that section 81.1 is an all or nothing proposition because it was meant to be cost-free to the employer. Since the costs would be incurred whether some or all the benefits were cancelled, this does not point us toward the company's interpretation of section 81.1.

14. There was some evidence that cancelling a portion of the benefits might result in a minimal administrative cost as the administrative overhead was transferred from a larger number of benefits to a smaller number. However, the union in this case indicated that it would be willing to pay such cost as part of continuing the benefits, and that it was not out to "gouge" the employer.

15. The company's second argument with respect to the intent of section 81.1 was related to the union's evidence that requiring it to take over all the benefits in strike situations would bankrupt its strike fund. Ms. Kuz, who testified on behalf of the company, seemed to suggest that the company wanted the union to get a taste of what it was like to pay for the full range of benefits. In addition, she said that one of the reasons the company refused to continue only selected benefits was that it wished to use the expense of the other benefits to put pressure on the union to settle the strike. Counsel argued that this was a salutary effect which was at least one of the purposes of section 81.1.

16. It is useful to remember, however, that section 81.1 still imposes the cost of even selected benefits upon the union. In other words, it only alleviates the collateral pressure that the loss of the actual benefits themselves might exert on employees during a strike. The economic pressure of the cost of such benefits is still absorbed by the unionized employees. The effect of the company's argument would be to impose an additional cost upon employees, that is, over and above the cost of the benefits they wish to have continued. While presumably any cost will exert economic pressure, neither the evidence with respect to the purpose of section 81.1 or its structure suggest that it was intended to create a somewhat gratuitous levy on striking employees by requiring them to pay for benefits they do not want, at least for the duration of the strike. Rather, the employer is simply not required to continue those benefits for which the union does not tender payments.

17. Counsel for the company readily acknowledged that the nature of some of the benefits meant that continuing them during a labour dispute would lead to absurd or ridiculous results. In his view, however, this could be adequately addressed by the fact that labour relations parties are sensible and will usually agree on those benefits that need not be continued. If they cannot agree, he argued, the full package must be paid for by the union. Otherwise, an employer is entitled to cancel the entire coverage.

18. We are reluctant to adopt an interpretation of section 81.1 which leads to nonsensical results. While we have considerable faith in the ability of parties in labour disputes to manage these issues sensibly, as witnessed by the fact that this is the first application filed with the Board under section 81.1 since its passage, at the same time the parties before us are living proof that there are times when the parties require the assistance of the Board. When that happens, we do not think it either wise in terms of common sense labour relations or in keeping with generally

accepted principles of interpretation to construe section 81.1 in a manner that leads to absurd consequences.

19. The company also took the position that section 81.1 is akin to the freeze provisions contained in section 81, and that we should therefore interpret the latter as imposing a freeze on all the benefits unless the parties agree otherwise. However, section 81.1 is drafted very differently from section 81. Indeed, a comparison of the two sections serves mainly to highlight their dissimilarity. Section 81.1 does not impose a freeze at all; rather the benefits are continued at the instance of the union and only upon tender of the payments necessary to do so. The language and structure of the two provisions actually suggest significant differences in how they are to be applied.

20. Having regard then to the language of section 81.1, its intent, and its application, we found that the union was entitled to tender payments for selected benefits.

21. The evidence indicated that the situation between these parties became derailed over their dispute with respect to the selected benefits issue. Counsel for the union advised the Board that the union had not suffered any damages at that point in time. Keeping in mind the fact that most parties are in fact able to resolve the matter of benefits during a labour dispute, we decided to advise the parties of our ruling on the first issue, reserve our ruling on the second issue, and make certain procedural directions for the purpose of facilitating both the litigation process and settlement. As a result, we issued the following decision:

1. Having carefully considered the parties' submissions, we are of the view that the applicants were entitled to tender payments for selected benefits under section 81.1. It appears to us that our finding in this regard may be of assistance to the parties in resolving the other issues in dispute in this matter. To give the parties that opportunity, and pursuant to sections 104 and 105 we direct that the responding party provide to the applicants information with respect to the amounts necessary to continue the benefits selected by the applicants.

2. We are reserving our decision at this time on the other issues in dispute to allow the parties to resolve them. If they are unable to do so, they must notify the Registrar accordingly. The reasons for our decision on this issue above will follow.

22. Since the time of our initial decision and before the issuance of these reasons, the responding party applied for reconsideration, and for a decision with respect to the other issues in dispute. We find it convenient to address those requests in these reasons as well.

23. The company takes the position that the Board could not issue a direction with respect to the production of information without deciding the tender issue. In counsel's view, we did not have the jurisdiction to do so because our direction was similar to a potential remedy requested by the applicant, and a remedy could not be forthcoming unless or until we found that the responding party had violated the Act. In addition, counsel argues that we could not issue such a procedural direction under sections 104 and 105 because the hearing in this matter was completed.

24. To some extent, the company's first argument in this regard reflects its argument at the hearing with respect to the sequence in which the Board should decide the issues in this case. Since we rejected that argument for the reasons described above, we are not inclined to address it again. Beyond that, however, we note that the Board has a very broad authority to make procedural orders of various kinds. Portions of sections 104 and 105 provide as follows:

104.-(13) The Board shall determine its own practice and procedure but shall give full opportunity to the parties to any proceeding to present their evidence and to make their submissions.

(13.1) The Board may make rules governing its practice and procedure and the exercise of its powers and prescribing such forms as it considers advisable.

* * *

105.-(1) The Board shall exercise the powers and perform the duties that are conferred or imposed upon it by or under this Act.

(2) Without limiting the generality of subsection (1), the Board has power,

- (a) to require any party to furnish particulars before or during a hearing;
- (a.1) to require any party to produce documents or things that may be relevant to a matter before it and to do so before or during a hearing.
- (a.2) to summon and enforce the attendance of witnesses and compel them to give oral or written evidence on oath, and to produce the documents and things that the Board considers requisite to the full investigation and consideration of matters within its jurisdiction in the same manner as a court of record in civil cases;

* * *

- (l) to determine the form in which and the time as of which any party to a proceeding before the Board must file or present any thing, document or information and to refuse to accept any thing, document or information that is not filed or presented in that form or by that time;
- (m) to attach terms or conditions to any order.

25. Section 104(13.1) also gives the Board the power to make rules governing its practice and procedure and the exercise of its powers. Rule 21 provides as follows:

- 21. The Board may also require a person to provide any further information, document or thing that the Board considers may be relevant to a case.

26. These powers, unlike those under section 91 of the Act, are not dependent upon a finding of violation. On the contrary, the way in which some of them are framed and the nature of those powers indicates that they may be used before a hearing commences or during its course as well.

27. If the Board has the power to direct the production of certain information, then the fact that similar information is also requested as part of a remedy in an application does not vitiate that power. Applicants often ask for a variety of orders from the Board, some primarily procedural in nature and some of a more remedial character. In fact, these categories are not particularly helpful in the analytical sense, since they can often overlap. In jurisdictional terms, the real issue is whether the particular order can be made under section 104, 105 and Rule 21, or whether it can only be made under section 91 which requires a finding of a violation.

28. In our view, there is no question that the Board has the jurisdiction to make an order requiring the production of information. Section 104(13) which permits the Board to determine its own practice and procedure empowers us to make this kind of order, and for many years, the Board ordered the production of information, for example, in cases under sections 1(4) or 64 by virtue of this provision alone. Section 104(13.1) now gives the Board the power to make its own rules, which includes Rule 21 specifying that the Board may require a party to provide further information. In addition, section 105(2) now enables the Board to require a party to furnish particulars, produce documents or things, determine the form in which and the time by which a party

must file or present any thing, document or information, and attach terms or conditions to any order.

29. The information that the Board ordered the company to produce falls into all of the categories of particulars, documents, things and information. Since one of the outstanding matters in dispute is whether the union tendered payments, one of the factual issues is how much the union had to tender. The company denies that the union tendered payments; requiring it to provide particulars of how much had to be tendered is hardly a novel proposition. The information in this regard is generally contained in an invoice which is unquestionably a document, the word "things" is all encompassing, and "information" speaks for itself.

30. The company argues that the production of particulars and documents or things is limited to before or during a hearing, and that the hearing in this matter was concluded. We note firstly that section 104 and Rule 21 have no limitations in this regard, which effectively disposes of this argument. In any event, however, while section 105(2)(a) and (a.1) have temporal limitations indicated on their face, it is difficult to say that the hearing in this matter has concluded. Although the initial days of hearing have been completed, there is always the possibility of additional hearing dates in a case, for example, where the implementation of a remedy is in dispute, where the Board decides to schedule hearing dates to address a reconsideration request such as the one before us, where the Board directs argument on a matter or case law which came to its attention after the initial hearing dates, and so forth. A hearing is not completed until such time as all matters which require hearing have been finally disposed of. To decide otherwise could deprive the Board of critical procedural powers part way through its proceedings. In the instant case, we have not even decided some of the issues in dispute, let alone finally determined all matters requiring hearing.

31. In other words, the Board had ample authority to make the production order in question without resorting to section 91. In these circumstances, the absence of a finding of a violation is irrelevant. The fact that the applicant requested an invoice in the remedy portion of its application is not a matter going to jurisdiction, then, but merely to the appropriateness of a production order for similar information being made for procedural purposes, a matter entirely within the Board's discretion. In the exercise of its discretion in this regard, the Board will obviously be careful to ensure that its procedural orders are directed at procedural matters, rather than providing remedies. At the same time, the Board should not be unwilling to make a procedural direction which it finds appropriate, simply because a party has also asked for something similar as a remedy. In this case, the Board was of the view that this order was eminently sensible and suitable in the circumstances because it would facilitate the litigation process, including the Board's settlement procedures.

32. Settlement is a critical and integral part of the Board's litigation processes. Because traditional adversarial hearings are an expensive, time-consuming and often clumsy means of resolving labour relations disputes, the Board has designed its procedures to emphasize and encourage the resolution of disputes by agreement. Settlements are often much more finely tuned to the parties' labour relations needs, more likely to be acceptable to the parties, and less likely to give rise to implementation difficulties. They are also particularly desirable in a context where the parties are typically either in or commencing what will be a continuing relationship and where many matters are extraordinarily time sensitive. In such a context, the tendency of litigation to identify a "winner" and a "loser", and that often only after considerable delay, is problematic. For these reasons, the Board employs a team of skilled mediators to assist the parties in this regard. It has also developed sophisticated settlement protocols, for example, with respect to certification applications which are more fully described elsewhere (*Santa Maria Foods*, [1981] OLRB Rep. Nov. 1618).

33. In this kind of litigation environment, the Board will often make directions to facilitate settlement of all or part of an application, including the provision of information, particulars, documents and so forth. Alternatively, the Board may appoint an officer to ascertain certain information by examining a party's records which may be then provided to another party, for example, when a record check is carried out.

34. The Board will also determine particular issues in a specific order interspersed with opportunities for settlement if it is of the view that this would be of assistance to the parties. The most common example is where the parties are engaged in working through the myriad of contested issues which may arise in a certification application. The parties may find that although they have reached agreement on some matters, they have come to an impasse on one issue. In those circumstances, the Board may decide, for example, only the composition of the bargaining unit, to clear the way for the parties to continue to try and settle the other matters in dispute. It is this procedural flexibility and nimbleness which, among other things, enhances the Board's effectiveness as a labour relations tribunal. In some cases, the Board's orders and determinations will be primarily directed at facilitating settlement. In others, its main concern will be to simplify and expedite the hearing, and in many, there will be some overlap between these two goals. We note that sections 104, 105 and Rule 21 do not limit the purposes for which procedural orders may be made, or exclude settlement procedures from such purposes.

35. In the instant case, the circumstances suggested that if the Board ruled on one issue, directed the production of certain information and provided the parties with a hiatus for settlement by reserving on other issues, the results might well be fruitful with the attendant reductions in cost and delay for the parties. This is what prompted us to make the direction set out above.

36. For all these reasons, the application for reconsideration is dismissed. As it turns out, the applicant has now advised us that the strike has settled. In light of the parties' correspondence in this regard, we grant leave to the applicant to withdraw the remainder of the application.

2861-92-R Ontario Nurses' Association, Applicant v. Public General Hospital Society of Chatham, Responding Party

Certification - Employee - Occupational Health Nurse found to be "employee" within meaning of the *Act* and included in nurses' bargaining unit - Board finding that responsibility for completing certain workers' compensation forms not a managerial function as contemplated by section 1(3) of the *Act*

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *J. A. Ronson* and *P. V. Grasso*.

DECISION OF RUSSELL G. GOODFELLOW, VICE-CHAIR, AND BOARD MEMBER P. V. GRASSO; February 24, 1994

1. This is the continuation of an application for certification.

2. By decision dated January 21, 1993, the Board certified the applicant on an interim basis for the following bargaining unit:

all registered and graduate nurses employed in a nursing capacity at Public General Hospital Society of Chatham, regularly employed for not more than twenty-four (24) hours per week, save and except Unit Managers, persons above the rank of Unit Manager, and *pending resolution of the dispute excluding as well, Occupational Health Nurse.*

A Labour Relations Officer was then appointed to inquire into and report to the Board on the duties and responsibilities of the Occupational Health Nurse, Janet Deactis.

3. The Officer has since reported with a transcript of Ms. Deactis' evidence and the parties have made written representations as to the conclusions the Board should draw from that report. It is the employer's position that Ms. Deactis is not an "employee" because she exercises "managerial functions" and "is employed in a confidential capacity in matters relating to labour relations" within the meaning of section 1(3) of the *Labour Relations Act*.

4. The Board does not agree. The evidence reveals that there is only one employee that can be described as having *any* sort of reporting relationship to Ms. Deactis. That individual is a clerical person, not in the applicant's bargaining unit, who shares an office with Ms. Deactis and reports primarily to Ms. Deactis' supervisor, the Director of Occupational Health Services.

5. With respect to other employees, including those in the applicant's bargaining unit, Ms. Deactis performs only a limited role in hiring, transfer and discipline, essentially predicated on her nursing expertise. For example, with respect to hiring and transfers, Ms. Deactis is involved in "pre-placement interviews". Her role is limited to assessing whether candidates meet the physical requirements of the job. She has no authority to hire, either alone or in conjunction with anyone else. Ms. Deactis' role with respect to employee transfers is similarly circumscribed.

6. In the case of "discipline", Ms. Deactis' involvement is restricted to advising the Director of Human Resources whether employees have completed their health tests in accordance with a predetermined schedule. If they have not, it is the Director of Human Resources that issues a letter of suspension until the employee completes the test, at which time the suspension is lifted. Likewise, employees are required to advise Ms. Deactis as to why they have been off sick and to provide a doctor's note. In accordance with another policy, albeit one in which Ms. Deactis appears to have had some considerable input, failure to do so can result in non-payment for the relevant time period.

7. Somewhat more discretion is required, however, when Ms. Deactis assesses the quality of the doctor's note and the employee's ability to return to work. In the former case, Ms. Deactis may require that an untimely note be updated. In the latter, Ms. Deactis has the authority to determine whether an employee is, in accordance with her assessment of the employee's well-being and her knowledge of the job, fit to return. In the lone instance in which Ms. Deactis determined that an employee was unfit to return, the only consequence was that the employee remained off work, *with pay*, pending a further assessment by another physician.

8. In a similar vein, Ms. Deactis is involved in the administration of the hospital's absenteeism programme. Apart from what has already been described, however, her function here appears to be limited to record-keeping and advising management on such matters as the dates of illness and whether the illness is the same as a previous one.

9. Apart from input in respect of the clerical person, Ms. Deactis has no role in performance appraisals. She has no involvement with employee promotions or wage increases, and there is no evidence that she has any authority to schedule, direct or review the work of others. While she can grant some casual time off to the clerical person in the Director's absence, any significant period requires the Director's approval.

10. Ms. Deactis plays no role in respect of lay-offs, provides only limited input into the departmental budget, and may propose, but not adopt, policies for her area.

11. The employer also relies on Ms. Deactis' role in administering the workers' compensation programme and her participation in establishing and monitoring modified work programmes and hospital safety as evidence of her managerial status.

12. With respect to workers' compensation, Ms. Deactis completes the Form 7 (Employer's Report of Accidental Injury or Industrial Disease) on behalf of the Hospital. This may involve disputing the *bona fides* of a claim based on Ms. Deactis' own medical assessment of the alleged injury or the circumstances surrounding the claim. Ms. Deactis also completes the Form 9 and applies for second injury enhancement relief. None of these functions, however, are managerial within the meaning of section 1(3) of the Act. It is the Workers' Compensation Board that decides whether an employee's claim will be paid, not Ms. Deactis. Ms. Deactis' role is to provide information to the Board, largely based on her professional expertise, which may or may not be of assistance in determining whether an employee will be entitled to the income protection provided by the statute. There is no evidence that any such function either has been or could be the subject of a grievance under the collective agreement, or that they are carried out primarily or even substantially in relation to members of the applicant's bargaining unit. By definition, these matters are the subject of legislative prescription, not collective bargaining. They do not fall within the ambit of the union's exclusive bargaining agency.

13. The Board also finds nothing "managerial" in Ms. Deactis' involvement in hospital safety or modified work programmes for employees returning from illness or injury. In the former area, Ms. Deactis discusses safety concerns that come to her attention with the hospital safety officer or the manager responsible for the area. In the latter context, Ms. Deactis may serve as part of a team that designs and monitors a return to work programme. Neither of these activities involve the kind of decision-making required by section 1(3).

14. Finally, the employer maintains that Ms. Deactis is "employed in a confidential capacity in matters relating to labour relations". The Board sees no evidence, however, of a "regular and material involvement" in labour relations matters as required by this aspect of the section 1(3) exclusion. Merely being privy to employee medical information is not an impediment to employee status under section 1(3); nor is one episode of consultation on a limited number of collective agreement proposals, or the attendance, in the Director's absence, at management meetings where labour relations issues have been discussed.

15. In this respect, it is interesting to note that the collective agreement proposals upon which Ms. Deactis was asked to comment involved a request by the union for information on modified work programmes and copies of completed Form 7's. Neither of these requests were seen by Ms. Deactis as appropriate areas for collective bargaining. The evidence also fails to state what use was made of Ms. Deactis' comments, or why this isolated request could not have been satisfied by the Director.

16. There is also nothing on the evidence as to how often Ms. Deactis stands in for the Director at the management meetings or the precise nature of the labour relations issues discussed. Inasmuch as Ms. Deactis admitted to an entirely passive role in these meetings, it would be an odd labour relations result if this involvement were to deprive her of employee status under the Act.

17. The Board therefore finds and declares that Ms. Deactis is an "employee" within the meaning of section 1(3) of the Act.

18. A final certificate will issue to the applicant for the following bargaining unit:

all registered and graduate nurses employed in a nursing capacity at Public General Hospital Society of Chatham, regularly employed for not more than twenty-four (24) hours per week, save and except Unit Managers, and persons above the rank of Unit Manager.

DECISION OF BOARD MEMBER J. A. RONSON; February 24, 1994

1. I disagree. Taken in their entirety, the job functions of Ms. Deactis place her in a conflict of interest vis-a-vis the rights and duties of her proposed union brothers and sisters. Nowhere is this potential for conflict made more plain than by the request of the union for information on modified work programs and copies of completed forms. I find that Ms. Deactis is not an "employee" within the meaning of the Act.

3067-93-M Canadian Union of Public Employees, Local 3678, Applicant v. Quadrille Development Corporation c.o.b. as the Residence on the St. Clair, Responding Party

Practice and Procedure - Reference - Union requesting production of certain documents - Employer not disputing relevance of documents but asserting that production should not be ordered where health legislation and professional obligations impose standards of confidentiality on health professional with respect to medical information - Board directing that documents sought be produced - Board finding it unnecessary to order that confidential documents tendered to Board be sealed in view of Board's general practice and having regard to provisions of *Freedom of Information and Protection of Privacy Act*

BEFORE: S. Liang, Vice-Chair.

APPEARANCES: Jeffrey Sack and William Nichol for the applicant; Tim P. Liznick, Malcolm Winter, Carolyne Harris, Lynne Wyvin and Scott Williams for the responding party.

DECISION OF THE BOARD; February 17, 1994

1. The applicant has requested production of certain documents. The respondent does not dispute the relevance of the documents to the issues in dispute, but asserts that production should not be ordered where health legislation and professional obligations impose standards of confidentiality on health professionals with respect to medical information.
2. Having regard to the submissions of the parties and the material before it, the Board orders the respondent to produce to the applicant those documents set out in the applicant's letter of February 10, 1994.
3. The parties have agreed and the Board orders that these documents will not be disclosed except to the Board and to counsel to the parties, who shall preserve their confidentiality (subject only to obtaining instructions).
4. The parties also requested that the Board order that any confidential documents ten-

dered to the Board be sealed and not disclosed by the Board. It is not the general provisions of the *Freedom of Information and Privacy Act*, which regulated the disclosure of such documents, we find it unnecessary here.

5. The parties jointly requested the Board to direct that the portion of the hearing relating to such documents shall be held *in camera*. Further the parties jointly requested that in any decision of the Board, any reference to these documents shall be made in such a way as to preserve the confidentiality of the identity of residents and information in their medical records. This panel indicated to the parties that these requests may be made directly to the panel of the Board hearing this matter.

6. This panel is not seized.

2690-93-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. 601192 Ontario Ltd. c.o.b. as Simcoe Terrace, Responding Party v. Christian Labour Association of Canada, Intervenor

Bargaining Unit - Bargaining Rights - Certification - Pre-Hearing Vote - Applicant union proposing single "all employee" bargaining unit - Incumbent union asserting that separate units of Registered Nurses and Registered Nursing Assistants and of all other employees appropriate - Applicant's proposed unit found to be appropriate - Board directing that ballots cast in pre-hearing vote be counted

BEFORE: *S. Liang, Vice-Chair*, and Board Members *F. B. Reaume* and *E. G. Theobald*.

DECISION OF THE BOARD; February 18, 1994

1. This is an application for certification in which a pre-hearing representation vote was requested, and has been held. By decision dated December 17, 1993, following the taking of that vote, the Board directed any party wishing to make representations as to the outstanding dispute relating to the appropriate bargaining unit, to file such representations by December 31. The Board indicated that if no party requested an oral hearing, the Board may issue a further decision on the basis of the material before it.

2. No representations have been received further to the Board's direction. The Board does have, however, written representations which followed the meeting with a Labour Relations Officer in which the dispute relating to the bargaining unit arose.

3. Having regard to those representations, and the material before it, and the absence of a request for an oral hearing, the Board is satisfied that it can decide the issue in dispute on the basis of the material before it.

4. The nature of the dispute is whether the appropriate bargaining unit should be a single unit, or whether there should be two bargaining units. The applicant, which seeks to displace the bargaining rights of the intervenor, and the respondent assert that the appropriate bargaining unit is:

all employees of 601192 Ontario Limited c.o.b. as Simcoe Terrace in the City of Barrie, save and except supervisors, persons above the rank of supervisor, and office and clerical staff.

5. The intervenor asserts that the appropriate bargaining units are the following:

- (a) all registered and Graduate Nurses and Registered and Graduate Nursing Assistants of 601192 Ontario Limited c.o.b. as Simcoe Terrace in the City of Barrie, save and except supervisors and persons above the rank of supervisor and office and clerical staff.
- (b) all employees of 601192 Ontario Limited c.o.b. as Simcoe Terrace in the City of Barrie, save and except supervisors, persons above the rank of supervisor, office and clerical staff, Registered and Graduate Nurses, and Registered and Graduate Nursing Assistants.

6. Even if we accept all of the facts relied on by the intervenor in support of its position as true, we are satisfied that the bargaining unit proposed by this applicant is appropriate for collective bargaining.

7. There is no dispute that the collective agreement between the intervenor and the respondent contains a recognition clause which describes the bargaining unit in exactly the same terms as the unit sought by the applicant. This recognition clause combines bargaining rights which were acquired by the intervenor by way of three separate certificates granted by the Board over the course of approximately five years (in 1987, 1989 and 1992). The last of these related to a unit of registered and graduate nurses employed in a nursing capacity, and was granted on October 27, 1992.

8. It is not entirely accurate to state, as the intervenor has, that the "Board's long-standing practice is to recognize registered nurses as professional employees, and to exclude them from an "all-employee" bargaining unit unless these professional employees have indicated their desire to be represented by the same trade union which acquires bargaining rights for the all-employee bargaining unit." It has been the case that the Board has not generally required the *inclusion* of registered nurses in a bargaining unit relating to the health care sector against the position of an applicant. In such a case, the Board has made a determination that a unit which excluded such registered nurses was appropriate for collective bargaining.

9. Where as here, the applicant has requested the inclusion of registered nurses in the unit, the Board's task again is simply to determine whether this unit is appropriate in the sense that the employees share a "sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer" (*Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266).

10. The intervenor suggests that the interests of the registered nurses and registered nursing assistant is distinct from that shared amongst the rest of the employee complement. In this respect, the Board has also observed that real life collective bargaining has shown that it is possible to group together for collective bargaining purposes a group of employees with quite diverse skills, education, training and aspirations:

14. It will be seen that the statutory language has remained basically unchanged for more than four decades, and in the early years it provided the basis for making broad distinctions for bargaining unit purposes between such groups as: "white collar" office and technical employees, and "blue collar" production employees; skilled tradesmen (electricians, plumbers, sheet metal workers, etc.), and unskilled or semi-skilled workers; part-time employees and full-time employees; employees working for an employer in one plant or municipality and employees in another plant or municipality; and so on. However, these fairly simply, and then unexceptional

distinctions, do not apply so easily today. Collective bargaining has extended beyond its traditional “blue collar” industrial base, into the public sector and to increasingly sophisticated and diverse job hierarchies. Real life collective bargaining experience has outstripped some of the conventional wisdom and has shown that the collective bargaining system can exhibit quite a variety of structures, which, at one time, parties might have considered unconventional or inappropriate. Ontario Hydro, for example, has a province-wide bargaining unit, encompassing a broad range of employee classifications, and thousands of employees, ranging from unskilled workers to highly trained technicians. A typical municipal “inside workers” (white collar) bargaining unit may include occupations ranging from filing clerks, to computer programmers, economists and planners with a considerable amount of post-secondary or even graduate training [see the Board’s decision in *The Regional Municipality of Durham*, Board File 1818-84-R, decision released November 20, 1984]. The Ontario Civil Service bargaining unit contains thousands of employees ranging from clerks and typists to sophisticated scientific and technical personnel - and, incidentally, the staff of a number of provincial psychiatric hospitals (see: *Owen Sound General and Marine Hospital*, [1978] OLRB Rep. May 445, where the Board noted that in the government sector nurses, paramedicals, service employees, and clericals are all in the same unit, even though under the *Labour Relations Act*, they have typically been segregated into separate units). While at one time common opinion and industrial relations practice might have supported fairly rigid (almost “class”) divisions between employee groups, modern collective bargaining seems to be able to thrive quite well in many contexts without such rigid distinctions. It is no longer as easy as it once was to say that it is “inappropriate” to group together for collective bargaining purposes, employees with quite diverse skills, education, training, position in the job hierarchy or probable aspirations.

11. The Board has also observed that in an application to displace an incumbent trade union, the established bargaining structure is *prima facie* appropriate, particularly where there has been a long, well established collective bargaining relationship: see, for instance, *Reitzel Heating & Sheet Metal Ltd.*, [1988] OLRB Rep. Dec. 1310.

12. With these general observations in mind, we turn to the particular facts of the bargaining history at this workplace, as outlined by the intervenor. In granting full-time and part-time certificates to the intervenor in 1987 and 1989, the Board found that an “all-employee” bargaining unit which included registered nursing assistants was appropriate for collective bargaining. The respondent and the incumbent union then subsequently combined this unit with a unit of registered nurses. The intervenor states that the negotiation of the combination of these units came about, among other things, because the registered nurses wished to be represented in the same bargaining group with the registered nursing assistants. It asserts that these two groups share a community of interest. It also suggests that their interests are distinct from those of the rest of the employees. Apart from relying on its general understanding of the Board’s practices (which we do not find entirely accurate) to support this decision, the only concrete factor it refers to is a difference in work area as between the RN/RNA’s and the other employees.

13. On these facts, we are satisfied that the combined unit is one which demonstrates a sufficiently coherent community of interest such that the employees can bargain together on a viable basis. Although the history of the combined unit is relatively brief, it is clear that the RNA’s have bargained together with other employees since 1987 without apparent difficulty. Given the intervenor’s assertions regarding the community of interests as between the RN’s and RNA’s we see no reason why the combined unit would not be viable as well. Further, we find nothing in the facts relied upon by the intervenor to demonstrate that such a bargaining structure would cause serious labour relations problems for the employer (which incidentally supports such a structure).

14. The intervenor requests that the ballots cast by the registered nurses be counted in such a way that their wishes be taken into account, to some extent, separately from those of the other employees. Having found the bargaining unit proposed by the applicant to be appropriate for collective bargaining, we do not find such a proposal to have any merit. Within this unit, the wishes of

all employees in the bargaining unit as to their preferred bargaining agent have been tested by way of a secret ballot in which all affected employees have had the opportunity to vote; within this unit, each employee's wishes will be given equal weight.

15. The Board therefore directs that all ballots cast in the pre-hearing representation vote be counted.

2601-93-G United Brotherhood of Carpenters and Joiners of America, Local 2041 Applicant v. Spencer Construction Company Ltd. and Ian Spencer, Responding Parties

Construction Industry - Construction Industry Grievance - Damages - Remedies - Union seeking damages for wages owing against corporate employer and against corporate director in his personal capacity - Union relying on Ontario *Business Corporations Act* (OBCA) and *Employment Standards Act* in respect of order against director - Board concluding that Board without jurisdiction to enforce provisions of OBCA or ESA as if it were either a civil court in which a civil action had been commenced, or an employment standards officer making an order under the ESA - Board quantifying damages and making order against employer only

BEFORE: *S. Liang*, Vice-Chair.

DECISION OF THE BOARD; February 23, 1994

1. This is a referral of grievance to arbitration, made pursuant to the provisions of section 126 of the *Labour Relations Act*. In this referral, the applicant, the United Brotherhood of Carpenters and Joiners of America, Local 2041 ("the union") has requested remedial relief against Spencer Construction Company Limited and Ian Spencer. Among other things, the union requests an order that both respondents be directed to pay damages for breaches of the collective agreement.

2. On January 20, 1994 at 9:30 a.m., the time and date set for the hearing of this matter, no one appeared for the respondents. I waited until 10:00 a.m. in case they had been unavoidably delayed, and then proceeded with the hearing, being satisfied that notice of the hearing had been sent to the respondents at the last registered address for the corporation, and at the residence address of Mr. Spencer.

3. I heard the evidence of Richard Brown, Carol Sabourin and Todd Dalley and received documents relating to the issues before me. I also have before me a letter written by Mr. Spencer dated January 19, 1994, and further written submissions from the union with respect to the legal issues raised, dated February 1, 1994. Having regard to the evidence and material before me, I make the following findings and orders.

4. The title of these proceedings is amended to reflect the correct name of the company: "Spencer Construction Company Ltd." The Board finds that Spencer Construction Company Ltd. is bound to the provincial collective agreement between The Carpenters Employer Bargaining Agency and The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America, effective from August 1, 1992 to April 30, 1995. The Board finds that Spencer Construc-

tion Company Ltd. has violated this agreement, in failing to pay wages and associated benefits to Richard Brown, Carol Sabourin and Todd Dalley. These wages and benefits are owing from work performed by these employees in August and September of 1993.

5. The Board finds that the damages owing to these individuals amounts to \$3,047.75 for Mr. Brown, \$870.78 for Mr. Sabourin and \$2,595.76 for Mr. Dalley. The Board orders that the total damages of \$6,514.29 be paid to the union forthwith, on behalf of these individuals. The union has also requested that the Board order payment of \$45.75 in accordance with Article 9 of the collective agreement, setting out liability of an employer for liquidated damages for failure to make timely payment of benefit contributions. Having regard to the evidence before us and the provisions of the collective agreement, including Article 9.15, the Board orders Spencer Construction Company Ltd. to further pay, as damages for its violation of the collective agreement, the sum of \$45.75, to the union on behalf of the trustees of the pension and benefit funds.

6. As indicated above, the union has also requested relief against Ian Spencer personally. There is no dispute that Mr. Spencer is the President, one of two Directors of the company, and appears to be its controlling mind. There is also no dispute that Mr. Spencer is not personally bound to the collective agreement. In requesting an order against Mr. Spencer, the union relies on the provisions of the *Ontario Business Corporations Act, 1982* ("the OBCA") and the *Employment Standards Act* ("the ESA"). Sections 131(1) and (2) of the *Business Corporations Act, 1982* state:

131. (1) Directors' liability to employees for wages. - The directors of a corporation are jointly and severally liable to the employees of the corporation for all debts not exceeding six months' wages that become payable while they are directors for services performed for the corporation and for the vacation pay accrued while they are directors for not more than twelve months under the *Employment Standards Act*, and the regulations thereunder, or under any collective agreement made by the corporation.

(2) **Limitation.** - A director is liable under subsection (1) only if,

- (a) he is sued while he is a director or within six months after he ceases to be a director; and
- (b) the action against the director is commenced within six months after the debts became payable, and
 - (i) the corporation is sued in the action against the director and execution against the corporation is returned unsatisfied in whole or in part, or
 - (ii) before or after the action is commenced the corporation goes into liquidation, is ordered to be wound up or makes an authorized assignment under the *Bankruptcy Act* (Canada), or a receiving order under the *Bankruptcy Act* (Canada) is made against it, and in any such case, the claim for the debts is proved.

7. Section 58.20(1) of the *Employment Standards Act* states:

58.20(1) Liability of directors.-The directors of an employer are jointly and severally liable for wages as provided in this Part if,

- (a) where an employer is insolvent, the employee has caused a claim for unpaid wages to be filed with the receiver appointed by a court with respect to the employer or with the employer's trustee in bankruptcy and the claim has not been paid;
- (b) an employment standards officer has made an order that the employer is liable for wages, unless the amount set out in the order has been paid or the employer has applied to have reviewed it;

- (c) an employment standards officer has made an order that a director is liable for wages, unless the amount set out in the order has been paid or the employer or the director has applied to have it reviewed; or
- (d) an adjudicator acting under subsection 67(3) or a referee acting under section 68 or 69 has made, amended or affirmed an order that the employer is liable for wages or that the directors are liable for wages and the amount set out in the order has not been paid.

8. The union also relies on sections 45(8) and 126 of the *Labour Relations Act* which provide:

45.- (8) An arbitrator or arbitration board shall make a final and conclusive settlement of the differences between the parties and, for that purpose, has the following powers:

1. To determine the nature of the differences in order to address their real substance.
2. To determine all questions of fact or law that arise.
3. *To interpret and apply the requirements of human rights and other employment-related statutes, despite any conflict between those requirements and the terms of the collective agreement.*
4. To grant such interim orders, including interim relief, as the arbitrator or arbitration board considers appropriate.
5. To enforce a written settlement of a grievance.

126.-(1) Despite the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 45, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

(2) A referral under subsection (1) may be made in writing in the prescribed form by a party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within fourteen days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.

(3) Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and subsections 45 (6.3), (8), (8.1), (8.3) and (9) to (12) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

(4) The expense of proceedings under this section, in the amount fixed by the regulations, shall be jointly paid by the parties to the Board for payment into the Consolidated Revenue Fund.

9. In the union's submission, section 45(8)(3) of the *Labour Relations Act* gives the Labour Relations Board, as an arbitration board hearing a referral of a grievance pertaining to the construction industry, the power to apply the provisions of both the OBCA and the ESA. It is submitted that both of these are "employment-related statutes" within the meaning of section 45(8)(3). Even without section 45(8)(3), it is submitted that in hearing grievances referred under section 126, the Board acts as a creature of statute, and has the power to apply the general law in its determination of disputes under collective agreements.

10. The evidence discloses that Spencer Construction Company Ltd. was petitioned into bankruptcy on October 25, 1993. The union has submitted a claim with the trustee in bankruptcy for the unpaid wages and benefits, which has not been paid yet.

11. The union submits that its claim on behalf of the three employees fulfills all of the conditions for directors' liability set out in section 131 of the OBCA. This grievance constitutes an "action", has been commenced while Mr. Spencer is still a director, has been commenced within six months after the debts became payable, and does not exceed six months' wages that became payable while Mr. Spencer was director of the corporation, or twelve months' vacation pay.

12. Given that section 131(1) specifically refers to sums which payable under a collective agreement, it is submitted that it must have been the intent of the Legislature that in a grievance brought under a collective agreement for unpaid wages and benefits, a union could enforce the liability of a director on behalf of employees. In the union's submission, if section 131(1) does not allow an employee to recover unpaid wages under a collective agreement against a director by way of a grievance arbitration, then there is no recourse since the law precludes a civil action to enforce rights under a collective agreement.

13. In any event, the provisions of the ESA also provide for directors' liability for unpaid wages, and the facts of this case fall within those provisions.

14. For the purposes of this decision I will assume, without finding, that both the *Business Corporations Act, 1982* and the *Employment Standards Act* are "employment-related statutes" within the meaning of section 45(8)(3) of the *Labour Relations Act*.

15. I am unable to conclude that the Board has the jurisdiction to enforce the provisions of either the OBCA or the ESA as if it were either a civil court in which a civil action has been commenced, or an employment standards officer making an order under the latter statute.

16. The Board derives its jurisdiction in relation to grievance arbitrations in the construction industry from section 126 of the *Labour Relations Act*. That section states that a party to a collective agreement may refer to the Board a grievance concerning the "interpretation, application, administration or alleged violation of the *agreement*". [emphasis added] Section 45(1) describes arbitrations as relating to "differences between the *parties* arising from the interpretation, application, administration or alleged violation of the *agreement*..." It is within the context, therefore, of the arbitration of differences between the parties that arise in relation to a collective agreement, that section 45(8)(3) must be read. Section 45(8)(3) provides an arbitrator with certain powers *to the extent* that the arbitrator is engaged in determining differences between parties to a collective agreement as to the obligations under that collective agreement.

17. Also of relevance is the definition of "collective agreement" found in the Act, which states that it is an agreement between an employer or an employers' organization, on the one hand, and a trade union or a council of trade unions on the other hand.

18. In the case before us, the employer is Spencer Construction Company Ltd. It is this entity which is a party to the collective agreement, and which has undertaken certain obligations under the agreement. There is nothing in this collective agreement which sets out obligations on the part of directors of the corporation. There is no dispute that the directors before us are not party to the collective agreement.

19. The obligations of the directors which the union seeks to enforce through this grievance are not found in the collective agreement. Rather, they are obligations imposed by statute. Apart

from the statutes imposing these liabilities, an employee would have no right of action against a director for unpaid wages.

20. Therefore, to the extent that the source of the director's obligations for unpaid wages and benefits is not the collective agreement, but is found in the provisions of statutes, I find that this is not a matter which arises from the "interpretation, application, administration or alleged violation of the agreement".

21. The nature of the problem posed by the union's submission is highlighted if one were to consider some other scenarios. If section 45(8)(3) gives the Board the power to enforce the provisions of the OBCA and the ESA against a person who is not a party to the collective agreement, then there is no reason why a grievance could not be brought as against the directors *only*, without any reference to the corporate employer and without any need to prove a violation of the agreement by the corporate employer. In the case before us, for example, where the liability of a director in the context of a bankruptcy is not contingent on a successful action or an order of an employment standards officer against the employer, accepting the union's argument, the Board would have the power to order remedial relief directly against the director without any finding of a violation of the agreement by the employer. There is also no reason why a grievance could not be brought as against shareholders, who in certain circumstances are also made liable for unpaid wages under the ESA. In all these examples, it is difficult to see how the dispute concerns a difference between the parties to a collective agreement arising from the obligations found in the collective agreement.

22. Whatever the scope of the language of section 45(8)(3), I do not find that it is intended to expand the nature of grievance arbitrations so that the Board is engaged in enforcing the rights and obligations of persons who are not parties to the collective agreement, and where the source of these rights and obligations is established outside of the collective agreement.

23. There is no doubt that by statute, the Legislature in Ontario has altered common-law notions of privity of contract so that not only an employer which is party to a collective agreement, but that employer's directors and (in certain instances) shareholders, may become liable for unpaid wages. By this decision, I make no findings as to whether the conditions for finding directors' liability in the case before us have been made out. I simply conclude that grievance arbitration is not the mechanism by which to enforce this liability.

24. I am unable to agree with the union's submissions that the result of the Board declining to enforce the provisions of the OBCA, would be to leave an employee covered by a collective agreement in a worse position than an employee not covered by a collective agreement. There is no reason why both would not have the same access to an order of an employment standards officer under the ESA, which provides for directors' liability equivalent to that provided for in the OBCA. Further, it appears that courts in Ontario will not preclude a civil suit to collect unpaid wages where an interpretation of a collective agreement is not required: see George W. Adams, *Canadian Labour Law*, (2nd ed.) and the cases cited therein.

25. It should be stressed that my findings are not intended to delimit or apply to the exercise of an arbitrator's powers under section 45(8)(3) in relation to the *employer* which is a party to the collective agreement. It may be that in dealing with a grievance alleging a violation of a collective agreement by an employer, section 45(8)(3) provides an arbitrator with the authority to enforce obligations which are imposed on that employer by statutes. I do not have to determine the scope of this authority. Neither do I have to determine the extent to which this authority must be linked to an issue relating to the administration, interpretation, application, administration or alleged violation of a collective agreement, which is a question for another day.

3111-91-U; 3112-91-U Canadian Textile and Chemical Union, Applicant v. The Peel County Restaurant, Responding Party

Duty to Bargain in Good Faith - Lock-Out - Unfair Labour Practice - Following rejection by union of employer's final offer, employer locking-out employees and subsequently permanently closing business - Union then accepting offer, but employer taking position that offer no longer available - Board dismissing complaint that employer bargaining in bad faith by refusing to execute collective agreement on terms set out in its final offer - Board not satisfied that employer's lock-out of employees and subsequent closing unlawfully motivated - Complaints dismissed

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *J. A. Ronson* and *E. G. Theobald*.

APPEARANCES: *Nelson Roland* and *Laurell Ritchie* for the applicant; *Barbara G. Humphrey* and *Rick Vesely* for the responding party.

DECISION OF M. A. NAIRN, VICE CHAIR AND BOARD MEMBER J. A. RONSON, February 14, 1994

1. Board File No. 3111-91-U is a complaint filed under then section 93 of the *Labour Relations Act* (the "Act"). Board File No. 3112-91-U is an unfair labour practice complaint alleging that the responding party (the "employer" or the "restaurant") violated sections 3, 15, 64, 66, 67, 70, and 75 of the then Act. Both files deal with events that occurred in 1991 and are subject to the provisions of the Act as they existed prior to its amendment in January, 1993.
2. The parties referred to the employer as "The Peel County Restaurant" although the legal or corporate entity remained unclear. The restaurant is part of a broader holding known as the Bristol Group, which includes two large hotels, and which is owned by Mr. David Dennis.
3. The applicant (the "union") has held bargaining rights for the employees of the restaurant since 1987. Prior to that the employees were represented by another trade union for most of the restaurant's fifteen year history. The events giving rise to these complaints concern conduct surrounding the negotiations for the third collective agreement between these parties over a period in 1991. The restaurant closed on October 25, 1991.
4. The union asserts that the employer bargained in bad faith and engaged in an unlawful lockout. The lockout was unlawful, it was asserted, because the employer's motive in locking out was to seek to avoid its lawful obligations under the *Labour Relations Act* and the *Employment Standards Act* (the "E.S.A."). The restaurant was closed following the implementation of a timely lockout. The union asserts that the employer has thereby been able to avoid making payments to employees in respect of notice, payments that would otherwise be required by the E.S.A., and has avoided entering into a collective agreement. The employer argues that at the time of closure, there was no agreement between the parties and that essentially, the union miscalculated the seriousness of the employer's position in negotiations, ultimately leading to the closure.
5. Although the hearing took some days and was spread over a lengthy period, many of the facts were not in dispute (although characterizations of those facts may be). A number of documents exchanged during the negotiations and various pieces of correspondence were placed in evidence. A considerable amount of the evidence concerning the details of the negotiations and discussions between the parties is ultimately of limited assistance in our determination and will not be referred to.

6. The relevant facts may be summarized as follows. In late April, 1991 the union gave notice to bargain for the renewal of the collective agreement. The existing agreement was to expire at the end of June, 1991. Bargaining commenced and the parties agreed to deal with non-monetary issues first. At that time Mr. Marc Hamber, the Food and Beverage Director for both the restaurant and the Bristol Place Hotel (part of the "Group") was the spokesperson for the employer. He acted primarily as an operations manager for the restaurant dealing with day to day issues including labour relations. Mr. Louis Reindara, the Manager of the restaurant was present for some of those early discussions.

7. Ms. Laurell Ritchie, the Executive Vice-President of the union, was its spokesperson. The union's negotiating committee also included representatives from the bargaining unit.

8. There were four meetings to discuss non-monetary issues and Exhibits 2-12 set out the progress of those negotiations between May 28 and July 29, 1991. As might be expected, certain matters were resolved and others remained outstanding. Although monetary issues had not yet been discussed, there was an indication from Mr. Hamber to the union in early September to expect demands for concessions given the financial state of the restaurant. Following the July 29th meeting, the union applied for conciliation.

9. The restaurant had been losing money for some time, but in 1990 and into 1991 those losses were increasing. In earlier sets of negotiations the employer had raised a need for concessions but the parties had negotiated compromises. Renovations completed in 1989 did little to attract new business. There were fewer customers in the restaurant, the restaurant began to close on Sundays, available hours had been reduced, numerous positions and classifications were eliminated, and employees (both within and outside the bargaining unit) had lost hours or had been laid-off. Other cost-containment measures had also been implemented. According to Mr. Dennis, the restaurant's losses in 1990 were (approximately) \$262,000.00, and by August 1991, the year's losses had increased to over \$500,000.00.

10. We heard much evidence regarding the various discussions between the parties as to the expression by the employer and the knowledge or appreciation of the union as to the restaurant's financial condition. There were allegations back and forth that the union had been unwilling to accept financial documentation (proffered by the employer for the purpose of ensuring that the union was aware of its difficult financial state) and the general unhelpfulness to the union of those documents as it understood they would not reflect costs specific to the restaurant (as opposed to the group of operations). The union did not wish to engage an auditor to tell it what it already knew, that is, that the restaurant was suffering. No one disputed that times were tough. The disagreement was one of degree.

11. Monetary issues were first raised in the negotiations on September 16, 1991. The conciliator was present. Mr. Hamber presented a handwritten set of employer proposals which included a two-year wage freeze, elimination of employer participation in health and welfare, staff meals to be charged at fifty percent, and other proposals which required certain costs to be shifted from the employer to employees, including portions of uniform and laundering costs. There were also proposals for further staffing cuts. Although the parties spent the day in discussions and caucusing, little was accomplished. The union was not willing to agree to the concessions proposed. It made no formal response to the employer's monetary proposals.

12. At the conclusion of that meeting Mr. Hamber reported to Mr. Vesely, the General Manager of the Park Plaza Hotel with responsibilities including strategic planning and marketing for the restaurant. Mr. Hamber was concerned that the union was not taking the employer's financial position seriously. Mr. Vesely reported to Mr. Dennis who decided to get counsel involved in

an effort to ensure that the employer's message of the need for concessions was clearly communicated to the union.

13. The parties "no-board report" was dated September 20, 1991. The next negotiating meeting was October 4, 1991. A mediator was present for these discussions. Counsel attended with Mr. Hamber on behalf of the employer. Exhibit 15 was provided to the union at that time. It summarized the employer's response to the union's proposals and reiterated the employer's proposals set out on September 16. The mediator, Ms. Ritchie, and counsel for the employer spent the morning in discussions. The union was aware that the employer was seeking concessions in response to its understanding of its financial circumstances, although the union was not convinced that the viability of the restaurant was in jeopardy. At the end of the day, little had been accomplished. Employer counsel advised the union to expect an employer final offer at their next meeting.

14. The parties were in a legal strike and lockout position as of October 7, 1991. A further meeting had been scheduled for October 29 based on the parties' availability. However, that length of delay was unacceptable to Mr. Dennis and as a result, a meeting was scheduled for October 15. Prior to that meeting the employer sought to prepare a final offer. Counsel was unavailable and other counsel from her firm met with Mr. Vesely and Mr. Hamber to prepare the offer. Mr. Reinardo was also present for discussion concerning Appendix G of the collective agreement.

15. A final offer document was prepared and was presented to the union on October 15, 1991. It essentially restates the elements of the employer's position of October 4. The union was advised that Appendix G, an item earlier agreed to, had been revised. There are some aspects of the document that may represent typographical errors but which affect substance, and were therefore somewhat unclear. (For example the agreement normally expired on June 30th and the offer made reference to an expiry date of June 10th). The offer contains an introduction setting out an explanation of the employer's position; the particularly relevant portions provide as follows:

As has been indicated to Union representatives at the bargaining table under present circumstances the Restaurant is not financially viable. In order that both the Union and employees are able to make informed decisions about the direction they take in collective bargaining, the following information, the Company believes, is important...

... Based upon these results, the losses resulting from operating the business substantially exceed those which would be incurred if the property was left idle. ...

What follows is the collective agreement which the Company is prepared to enter into with the Union. We appreciate that the collective agreement outlined below contains certain elements which may be difficult for the Union and for its membership to accept. However, this agreement reflects what Management believes is realistic given the circumstances of the Restaurant outlined above. It is intended to enhance the possibility of the continued operation of the Restaurant. Even with acceptance of this agreement, it is anticipated that the Restaurant would continue to operate at a loss. The collective agreement would only reduce the size of the loss.

16. That introduction also sets out the dollar losses experienced by the restaurant, invites the union to review the financial information, and outlines the measures already taken to try to reduce costs and increase revenues.

17. At the conclusion of that short meeting, the union had not agreed to the employer's terms. It countered with a revised wage and benefit proposal. Given time constraints those were the only issues dealt with in the meeting.

18. Later that evening Ms. Ritchie spoke with counsel over the phone and learned that the

union's counter proposal had been rejected and the employer confirmed its position as set out in the final offer. Ms. Ritchie raised with counsel difficulties with Appendix G and also certain problems with Appendix D as it was written. Whether or not other issues were raised is ultimately of little relevance. While there were other issues, it is clear that by the end of the day on October 15, there was no agreement on monetary issues.

19. On October 16, counsel who had drafted the final offer wrote to the union in an attempt to clarify the employer's position and understanding of Appendices G and D. That letter indicated that the employer was willing to consider language proposed by the union that would reflect what the employer understood to be the parties' intention, that is, the existing scheduling practice.

20. Also on October 16, the union held a meeting of the employees to discuss the employer's offer, including the letter. The employees took a vote and rejected the offer, instructing the union negotiating committee to seek to set up another meeting with the employer, and to try and clear up those areas of confusion in the document. Although October 29 had been considered by the parties earlier, no further negotiating meetings were scheduled at this point.

21. At the conclusion of the union meeting, members of the union's negotiating committee met with Mr. Hamber. He wanted to know the results of the vote. Ms. Ritchie discussed some of the union's concerns with the employer's proposals and at a point in their discussion, Mr. Vesely called and decided to attend at the restaurant. There was much debate in the evidence as to how these discussions were to be characterized. Both Mr. Hamber and Mr. Vesely denied that they were in any way engaging in negotiations; that their only concern was the outcome of the vote. The fact is, Ms. Ritchie spoke to them of the difficulty that the employees were having with the idea of concessions and she raised Appendix G and D with them. As Ms. Ritchie put it, a negotiator is not likely to give up an opportunity to try and persuade the other party to move. Although she knew employer counsel was now its spokesperson, she had been dealing with Mr. Hamber and was not unwilling to engage Mr. Vesely in the discussions.

22. Both Mr. Hamber and Mr. Vesely testified that they were not really paying attention or listening too carefully to Ms. Ritchie's comments. Yet Mr. Hamber did ask her if she thought they were eighty percent of the way there, and Mr. Vesely did indicate he would get back to Ms. Ritchie. Ms. Ritchie asserts that this latter comment was in connection with setting up another meeting. Mr. Vesely disagrees, explaining that he did not know where things would go from there and that he would advise her. The union asserted that Mr. Hamber and Mr. Vesely's behaviour evidenced a willingness on the part of the employer to continue negotiating, and that that reflected on the motive of the employer in its decision to close. We only note at this stage that it is not illegal for a party to indicate that it is willing to keep the lines of communication open. It is required to do so. Whether that results in a change in its position remains to be seen in every case.

23. Mr. Vesely was unable to reach either counsel or Mr. Dennis that evening. In the morning he spoke with Mr. Dennis who advised him to implement the terms of the final offer. Mr. Vesely prepared and forwarded a letter to the union advising it that the terms of the offer would be implemented effective the following Monday, October 22, 1991.

24. Following the parties' discussions on October 16 and on learning of the employer's move, the union held a meeting and Ms. Ritchie forwarded a letter dated October 21 to Mr. Vesely. That letter set out the union's understanding of the effects of implementing the employer's proposal. Following some comments on those effects, the letter then sets out the union's position on matters in dispute. It is a counter-proposal which includes, among other things, a proposed reduction in the existing employer health and welfare contributions, certain continued provision of meals, Appendix G as previously agreed or an agreement to re-open discussion of it on certain

terms, and a wage freeze provided the employer be prepared to consider, on a good faith basis, an increase in the second year of the contract. The letter does indicate movement by the union. It does not reflect acceptance of the employer's position or agreement between the parties.

25. In response to that letter, the union received a letter from counsel dated October 24, 1991. Of relevance is that it reaffirms the employer's attempt to communicate the seriousness of its economic position through the tabling of the final offer, the union's continuing rejection of that offer, and advises the union that a lockout will commence effective October 25, 1991 at 4:00 p.m. That letter was received by the union by fax at 5:10 p.m. on October 24, 1991.

26. In fact the lockout commenced at 11:00 p.m. on October 24, 1991. Mr. Vesely and Mr. Dennis had initially discussed implementing the lockout on October 25 during the day. On reflection they decided that there would be less disruption to the restaurant and customers if the lockout started at the end of a business day. October 24 was preferred as it was a Thursday. By the end of the day on Friday, supplies would have been delivered and would be wasted, and staff would have been advised of, and expecting the weekend scheduling.

27. Employees at the restaurant were notified of the lockout during the evening of October 24 by Mr. Hamber. A notice had been prepared by Mr. Vesely. That notice had also been sent by Mr. Vesely to counsel, it appears, at 2:53 p.m. on October 24. There was no explanation why counsel's letter gave different advice to the union.

28. Mr. Hamber was approached by members of the union's executive during the evening of October 24. They were surprised by the lockout. Mr. Hamber advised them that Mr. Dennis was pushing to get a collective agreement signed. The local President wanted to know if the lockout could be postponed until Ms. Ritchie, who was then in Vancouver at a conference, returned, and indicated that the union needed time to consult with the bargaining unit. Another member told Mr. Hamber that they wished to meet to work out the discrepancies in the final offer. These individuals gave Mr. Hamber the impression that the union would sign the collective agreement if they were able to meet and the employer clarified certain matters. The lockout took effect 11:00 p.m. October 24, 1991.

29. Mr. Vesely and Mr. Dennis met as usual on the morning of October 25, 1991. Mr. Vesely advised Mr. Dennis that the staff wanted to continue to negotiate and were hoping to set up a meeting. This information seems to have tipped the balance. After some discussion Mr. Dennis concluded that he would close the business and he instructed Mr. Vesely to contact counsel and implement whatever steps were necessary to effect that decision.

30. Ms. Ritchie was notified of the lockout early on October 25. Counsel's letter was read to her and she spoke to a member of the union committee. On calling Mr. Hamber early that morning she knew that the employees had been advised of the earlier time for the lockout. Upon attempting to assess the extent of their dispute, Mr. Hamber directed Ms. Ritchie to Mr. Vesely. It was not clear whether Mr. Hamber was aware of the closure decision at this point. Ms. Ritchie spoke with Mr. Vesely from Vancouver that day concerning the lockout. He did not advise her of the closure. She was advised of the closure later that day upon trying to set up a meeting with the mediator, who had been advised of the closure by counsel.

31. On Ms. Ritchie's immediate return, the bargaining unit met and agreed to the final offer document and the employer was so advised by letter dated October 27. That letter also asks the employer to advise the union as to whether or not that decision altered the employer's notice of closure. Mr. Dennis responded to that question in the negative, stating that the decision was final and was a result of "the continuing uncertainty (arising out of the unsuccessful attempts to negoti-

ate a Collective Agreement compatible with the needs of the business) that persisted throughout September and October". On November 12, 1991 the union forwarded to the employer the October 15 final offer document and the letter of October 16 signed by the union's negotiating committee. Mr. Vesely responded that there was no one with the capacity to sign any proposed agreement because the restaurant had ceased to exist.

32. Appendix G was a subject of considerable evidence and debate. At times the evidence amounted to no more than a continuation of the parties' efforts at trying to convince the other of the correctness of the asserting party's position. It is a scheduling provision. We accept that in a restaurant operation, where part of the compensation package relies on gratuities, scheduling is an issue of considerable concern to employees. The parties had had difficulties with the existing language and had spent some effort in their earlier negotiations to effect language agreeable to both. Mr. Hamber agreed and Exhibit 15 confirms, that the parties had agreed to language for Appendix G as was asserted by the union.

33. However, in preparing the final offer, counsel was of the view that it did not reflect what the parties' intended, and was concerned about its possible ambiguity in the event of a dispute. Suffice to say that at that stage of the negotiations, the employer would have probably been well-advised to leave it alone. Mr. Hamber and Mr. Reindaro were present when negotiating the language. They were present to advise counsel. The Appendix was re-drafted and in evidence, counsel involved did agree that elements of the clause were different. While counsel or the employer may be of the view that the changes were inconsequential, the union did not agree. One obvious effect of including a newly drafted Appendix G in the final offer document was to jeopardize the union's view of the sincerity with which the employer was negotiating.

34. However, there is no basis for a conclusion that by rewriting Appendix G the employer was seeking to avoid its bargaining obligations. At worst it may represent a realization by the employer that it had agreed to something that it had not intended. Alternatively, it may be a case of counsel thrown in at the last minute, probably without full information as to the bargaining or the parties' history, and attempting to forestall future problems, while inadvertently creating current ones. What is clear from the evidence is that Ms. Ritchie and counsel each understood the parties' intention to be something different. While not enhancing bargaining, in the circumstances we are not persuaded that it was unlawful for one of the parties to revisit an earlier agreed to provision, prior to a collective agreement being reached.

35. The union argued that the employer's conduct was illegal because the lockout was being used to damage and punish the union and the members of the bargaining unit; that the lockout was being used for a purpose not contemplated by the Act. The lockout was unlawful, it asserted, because it was done with a view to compel or induce employees or the union from exercising their rights under the Act. The union relies on *Burlington Northern Air Freight (Canada) Ltd.*, [1986] O.L.R.B. Rep. Dec. 1628 and the cases cited at paragraphs 117-119 therein.

36. The union asks, in what sense can the employer be said to be carrying out its legal right to lockout when the restaurant closed before the union had a chance to respond to the lockout? It argues that the purpose of the lockout could not therefore be to bring finality to the bargaining because of the practical impossibility of the union being able to respond. The lockout must have been intended for some other purpose - to punish employees by depriving them of benefits under the E.S.A. and also depriving them of a collective agreement that could have continued pursuant to successorship provisions.

37. The employer argued that it had attempted to make it clear to the union that the business required concessions in order to remain viable and that the union, failing to appreciate the seriousness of the employer's position, attempted to negotiate for more. The union could not expect the final offer to continue to be available, particularly after the closure, and it was only after the closure that the union purported to agree to the terms of the employer's offer.

38. The employer acknowledged that its position in bargaining was hard, but necessary in the context of the losses being suffered. It relies on *Sumner Press*, [1991] O.L.R.B. Rep. Oct. 1207 for the proposition that it is not the Board's role to protect either party from a miscalculation in the bargaining.

39. We turn first to the allegation that the employer bargained in bad faith. There was little dispute concerning the generally applicable principles and we refer to the summary of the law set out in *Sumner Press*, *supra*, at paragraphs 4-8 inclusive, and the discussion of "surface" versus "hard" bargaining in *Aristokraft Vinyl Inc.*, *infra*, at paragraphs 29-35 inclusive. There is nothing in the employer's conduct before the closure of the restaurant to suggest that it was not willing to enter into a collective agreement, albeit on terms that it sought. It provided the union with the opportunity to review its financial position. A reasonable business justification existed for the employer's position in the face of mounting and considerable losses. Those portions of the final offer document referred to in paragraph 15 can only reasonably be interpreted as advising the union that the restaurant was in serious risk of closing. The changes to Appendix G, while complicating the negotiations, do not evidence an intention to avoid the employer's responsibilities, and counsel invited a response from the union.

40. The union asserted that the employer had failed in its bargaining responsibilities by its lack of clarity in the final offer document, the changes to Appendix G, and because there were a number of individuals purporting to speak on behalf of the employer, resulting in confusion if not advertent attempts to derail bargaining.

41. The evidence does not support that conclusion. We have already discussed the difficulties arising from Appendix G. Having regard to Mr. Hamber's and Mr. Vesely's conduct on October 16, we are satisfied that the employer was prepared to entertain the union's concerns provided it was in the context of the union indicating its willingness to accept the employer's monetary position. Throughout this period, had the union had real concerns about who was speaking for the employer it knew that counsel remained spokesperson.

42. Throughout this period the parties were in a legal strike or lockout position and even assuming that the employer understood that the union was unlikely to engage in a strike, that would not alleviate all its uncertainty concerning the negotiations. Mr. Dennis testified that throughout this period he was anxious that the negotiations be concluded as quickly as possible in order to provide some certainty in helping to stem the losses that the restaurant was experiencing. Bringing counsel in to present a final offer at a point where there had been one meeting to discuss monetary issues, implementing the terms of that offer following its rejection, and deciding to lock-out the employees in the face of a further counter-proposal from the union are actions consistent with a conclusion that the employer was pressing for the conclusion of negotiations that had been underway for some six months, in the face of continuing losses.

43. We have little doubt that the appearance of the revised Appendix G created a setback in the negotiations. We also have little doubt that the unwillingness of the union to accept the employer's monetary proposals generated frustration in the employer's camp. However, those are the ebbs and flows of negotiations. It may be that Mr. Dennis did not fully appreciate the union's concerns regarding the final offer document. He was more focused on getting agreement on the

monetary concessions. At no time prior to the closure did the union indicate that it was willing to accept those terms. He had had them implemented to indicate his seriousness and had instructed that the employees be locked out. In response to the lockout, he was informed that the employees wanted to continue to negotiate. Mr. Dennis may be someone who hears only what he wants to hear. That may well have interfered with the quality or completeness of information that Mr. Dennis was receiving about the state of the negotiations and the various responsibilities for that progress or lack thereof. We are not persuaded however that that amounts to the employer having bargained in bad faith. It is inappropriate to speculate in hindsight as to what might have happened if one or other of the parties had responded differently through the course of the negotiations.

44. In order for the union to successfully assert that the employer has bargained in bad faith by refusing to execute a collective agreement on the terms set out in its offer of October 15 and counsel's letter of October 16, one must conclude that the offer remained on the table, available for the union's acceptance. The union argued that at the first opportunity following notice of the lockout, the union agreed to the terms of the offer. We note that the union also had notice of the closure at the point at which it purported to accept the employer's offer.

45. We are not persuaded that we ought to draw the conclusion that the employer is required to execute the terms of its earlier offer. The union rejected the offer by its vote on October 16. Following the implementation of its terms, the union made a counter-proposal, and arguably rejected the offer again. The employer then decided to lockout the employees. Even if the offer could be said to have remained in the face of those intervening events (noting an acknowledgement by Mr. Dennis in evidence that had the union agreed to those terms prior to the closure, there would likely be a collective agreement), after the closure, the union has little if any reason to assume that the offer remains. After a closure (and there was no reason to doubt the finality of this decision) there is little point in an employer bargaining terms and conditions applicable to active employment in the abstract, even ones that it had sought prior to the closure. There was every reason to conclude that the offer had been extinguished. In this regard we accept the reasoning in *The Toronto Jewellery Manufacturer's Association*, [1979] O.L.R.B. Rep. July 719, (at paragraphs 5-12) and the decision in *Pine Ridge District Health Unit*, cited therein. We note too that this case is quite distinguishable from *Saville Food Products, Inc.*, [1986] OLRB Rep. April 552, relied on by the union.

46. We find therefore that the employer's conduct did not constitute a failure to meet its obligations under section 15 of the Act to bargain in good faith and make every reasonable effort to effect a collective agreement.

47. Does the decision to lockout and the decision to close on the heels of that lockout, suggest it was motivated by an unlawful purpose? In *Aristokraft Vinyl Inc.*, [1985] O.L.R.B. Rep. June 799 the Board stated:

28. We are satisfied that if a lock-out is imposed by an employer "with a view to compel or induce his employees to refrain from exercising any rights ... under this Act", it is illegal even if it is otherwise timely. (See *Irving Oil Ltd.*, 80 CLLC 14,054 (N.B.C.A.).) The Board stated in *Westroc Industries Limited*, [1981] OLRB Rep. March 381 at 392:

"...a lock-out aimed at dissuading employees from exercising rights under the Act is never lawful and the concept of timeliness simply has no application to such activity."

[emphasis added]

That aim need not be the sole, principal, or predominant one of the lock-out. It is sufficient to establish that a lock-out is unlawful, regardless of timeliness, if unlawful intent forms even a part

of the motivation for the lock-out. (See *Westinghouse Canada Ltd.*, [1980] OLRB Rep. April 577 at 600-605, and in particular paragraphs 54-56). It is clear, therefore, that a determination of whether the lock-out was lawful in this case must rest on our assessment of the company's motive for imposing the lock-out. That assessment, as we said earlier, cannot be carried out in isolation. Regard must be had to all of the conduct of both parties, both before and during the lock-out to ascertain whether the company had an illegal purpose in doing what it did.

48. The union relies on the errors and lack of clarity in the offer of October 15 to argue that it was never intended as a final offer. It refers to the ongoing discussions between the parties, the confusion surrounding the two different times provided for the lockout to commence, and the fact that there was no practical opportunity for the union to respond to the lockout prior to the decision to close, to argue that the employer never intended the lockout for the purpose of inducing the union to agree to the employer's terms. It argued that the employer locked out the employees only in order to take advantage of the change in its obligations under the E.S.A. and to avoid being bound to a collective agreement.

49. In those cases where the Board has concluded that a closure represented a violation of the Act, the Board has conducted its usual assessment of whether or not legitimate business reasons existed for the closure and whether any other conduct might reflect on the employer's motive. So, in *Academy of Medicine*, [1977] OLRB Rep. Dec. 783, a lengthy and extensive history of anti-union conduct on the part of the employer was seen to reflect on the employer's motive in the ultimate closure of its operation and the Board concluded in those circumstances that there had been a violation of the Act. That case recognized that the Act "does not permit an employer to insulate itself from the prohibitions against anti-union conduct by simply discontinuing operations" (paragraph 37).

50. At paragraph 39 of that same decision, the Board stated that employees "do not run the risk that their employer will discontinue operations simply because it is unwilling to operate with a union". The evidence in this case does not lead to a conclusion that this employer was unwilling to operate with a union. It had so operated for approximately thirteen years. Its historical relationship with this union was described by both sides as "civilized".

51. Can it be said that the employer implemented this lockout in an attempt to dissuade employees from exercising rights under the Act or to avoid signing a collective agreement? The facts here are readily distinguishable from those, for example, in *Academy of Medicine*, *supra*, *Humpty Dumpty Foods Limited*, [1977] OLRB Rep. July 401; *Westinghouse Canada Limited*, [1980] OLRB Rep. April 577, or *Burlington Northern Air Freight*, *supra*. This employer was not unwilling to enter into a collective agreement. It did want an agreement on its terms and those terms had been rejected by the union more than once. The employer was facing mounting financial losses. It had bargained in good faith. We note that the cases that the union relied on in support of its argument that this lockout was unlawful involve conduct and findings that the employer had violated section 15 of the Act as well, and reflected conduct on the part of the employer throughout the bargaining process from which the Board was able to draw inferences with respect to the employer's anti-union motive.

52. While there was inaccurate communication to the union concerning the time of the commencement of the lockout, the local representatives and the employees learned of the correct time on October 24 prior to its commencement. The only real factual matter that the union can point to in support of its position is the speed with which the decision to close follows upon the implementation of the lockout.

53. If the closure decision had come, for example, forty-eight or seventy-two hours after the lockout commenced, could the union argue that the lockout was unlawful? Even on its own argu-

ment, the union would have had the time to respond to the lockout and had the opportunity to accept the employer's offer. One can only speculate of course as to whether or not the union would have been prepared to accept the employer's offer as a result of the lockout being implemented.

54. It cannot be said that Mr. Hamber, in speaking with employees on October 24, gave any indication that the employer was prepared to postpone any further action until Ms. Ritchie returned and the parties had met again. We heard no evidence from the local representatives and Mr. Hamber's evidence did not support such a conclusion.

55. What did occur between the implementation of the lockout and the following morning was that information was received by Mr. Dennis to the effect that the union wished to continue to meet with the employer for purposes of negotiations. Mr. Dennis responded to that information. He was fed up. The costs of maintaining the restaurant (something that everyone seemed to acknowledge had been a kind of "pet project" to Mr. Dennis) had outstripped the benefits. The restaurant was losing over \$50,000.00 dollars a month. The union had continued to reject the employer's monetary proposals. Even assuming that the parties were closer to reaching an agreement than Mr. Dennis understood, we are unable to conclude that the employer's conduct was motivated by an anti-union animus or to avoid a collective agreement or to unlawfully dissuade employees from exercising their rights under the *Labour Relations Act* so as to conclude that the lockout was unlawful.

56. We are also not persuaded that the fact of closing a business during a lockout, which may result in different consequences under other legislation regarding the employer's obligations on closure, makes the decision to lockout improper under the *Labour Relations Act*, even assuming one is aware of those consequences at the time of the decision. We note that the parties did not put in evidence or argue the specifics of any provisions of the E.S.A. or its effects on employees' entitlement under that Act following the closure. The rationale for that legislation to disentitle employees to payments in respect of notice in circumstances such as exist in this case is not readily apparent. However, the union must be taken to be aware of those potential risks and decide whether to let the negotiations progress to a stage where that becomes a possible outcome.

57. For the above reasons, these complaints are dismissed.

DECISION OF BOARD MEMBER E. G. THEOBALD; February 14, 1994

I agree with the conclusions of fact and law by my colleagues. However, I feel compelled to add that not only is any rationale for disentitling employees to payments in respect of notice under the *Employment Standards Act* not apparent in these circumstances, it is an inappropriate invitation to employers to act so as to effect this disentitlement - in circumstances where the closure occurs because of financial difficulties that are not attributable to the employees.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 1994

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0289-90-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Branair Mechanical Ltd. (Respondent)

Unit: "all construction labourers in the employ of Branair Mechanical Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Branair Mechanical Ltd. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

3410-92-R: United Steelworkers of America (Applicant) v. Wackenhut of Canada Limited (Respondent)

Unit: "all security guards of Wackenhut of Canada Limited in the City of Kitchener, the City of Waterloo, the City of Cambridge, the Town of Listowel and the City of Guelph, save and except patrol supervisors, persons above the rank of patrol supervisor, dispatchers, and office, clerical and sales staff" (98 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3732-92-R: United Steelworkers of America (Applicant) v. Barnes Security Services Ltd., Group 4 C.P.S. Limited (Respondents) v. Ontario Public Service Employees Union (Intervener)

Unit: "all employees of Barnes Security Services Ltd. employed at Metropolitan Toronto Housing Authority facilities in the Municipality of Metropolitan Toronto, save and except Field Supervisors and persons above the rank of Field Supervisor" (100 employees in unit)

0932-93-R: Canadian Union of Public Employees (Applicant) v. Board of Management of the O'Keefe Centre for the Performing Arts (Respondent) v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of The United States and Canada, Local 58, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of The United States and Canada, Local B-173 (Interveners)

Unit: "all employees of the Board of Management of the O'Keefe Centre for the Performing Arts in the Municipality of Metropolitan Toronto, save and except Managers, persons above the rank of Manager, Executive Chef, Stage Door Personnel, Chief Accountant, Executive Assistant, Program Coordinator, Assistant House Manager, Assistant to the Finance Administration Manager, Administrative Assistant and persons for whom any trade union held bargaining rights as of June 14, 1993" (15 employees in unit) (*Having regard to the agreement of the parties*)

0988-93-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Village of Creemore (Respondent)

Unit: "all employees of the Corporation of the Village of Creemore in the Village of Creemore, save and except Clerk and persons above the rank of Clerk, office, clerical and library employees, Canteen Manager and, pending resolution by the Board, excluding as well Parks and Recreation Manager and Road/Works Superintendent" (5 employees in unit)

1352-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Intercon Security Limited (Respondent)

Unit: “all employees of Intercon Security Limited at Molson Breweries of Ontario, 1 Big Bay Point Road in the City of Barrie, save and except supervisors and persons above the rank of supervisor” (11 employees in unit) (*Having regard to the agreement of the parties*)

1452-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Central Chrysler Plymouth (1981) Ltd. (Respondent)

Unit: “all employees of Central Chrysler Plymouth (1981) Ltd. in the City of Windsor, save and except supervisors, persons above the rank of supervisor and office and sales staff” (27 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1542-93-R: Labourers’ International Union of North America, Local 183 (Applicant) v. MS Maintenance Systems Inc. (Respondent)

Unit #1: (see Applications for certification Dismissed Subsequent to a Post-Hearing Vote)

Unit #2: “all employees of MS Maintenance Systems Inc. regularly employed for not more than 24 hours per week, engaged in cleaning and maintenance at Merrill Lynch, Canada Tower, Sunlife Centre at 200 King Street and Sunlife Tower at 150 King Street, Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (61 employees in unit) (*Having regard to the agreement of the parties*)

1655-93-R: Labourers’ International Union of North America, Local 607 (Applicant) v. PCL Constructors Eastern Inc. (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local 1669, International Union of Operating Engineers, Local 793, Iron Workers District Council of Ontario and International Association of Bridge, Structural and Ornamental Iron Workers, Local 759 (Intervenors)

Unit: “all construction labourers in the employ of PCL Constructors Eastern Inc. in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the District of Rainy River, save and except non-working foremen and persons above the rank of non-working foreman” (14 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1830-93-R: Ontario Public Service Employees Union (Applicant) v. Community Living - Central Huron (Respondent)

Unit: “all employees of Community Living - Central Huron in the Town of Goderich, save and except supervisors, persons above the rank of supervisor, office and clerical staff, excluding as well the position of assistant co-ordinator/residential supervisor” (55 employees in unit) (*Having regard to the agreement of the parties*)

1988-93-R: Service Employees Union, Local 183 (Applicant) v. Transcor Inc. (Respondent)

Unit: “all employees of Transcor Inc. in its First Tran Bus Services Division in the Counties of Lennox and Addington and Frontenac, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (57 employees in unit) (*Having regard to the agreement of the parties*)

2618-93-R: Ontario Public Service Employees Union (Applicant) v. The Governing Council of the Salvation Army in Canada and Bermuda (Respondent)

Unit: “all employees of The Governing Council of the Salvation Army in Canada and Bermuda employed by Salvation Army Mental Health Services in the Municipality of Metropolitan Toronto, save and except head of counselling, senior work supervisor, persons above the rank of head of counselling or senior work supervisor, secretary to the Administrator at Booth Industries, bookkeeper, students on placement, and persons for whom any trade union held bargaining rights as of October 19, 1993” (3 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

2808-93-R: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Pro-

vincial Conference of the IUBAC (Applicant) v. Gem-Campbell Terrazzo & Tile Inc. (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener)

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of Gem-Campbell Terrazzo & Tile Inc., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of Gem-Campbell Terrazzo & Tile Inc., in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2817-93-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Active Building Maintenance (Respondent)

Unit: "all employees of Active Building Maintenance engaged in cleaning and maintenance at 95

Grosvenor Street and 7 Queens Park Crescent, Provincial Government Building Frost North and Frost South, in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor," (9 employees in unit)

2870-93-R: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Environmental Export International of Canada, Inc. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Environmental Export International of Canada, Inc., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Environmental Export International of Canada, Inc., in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (24 employees in unit)

3003-93-R: United Steelworkers of America (Applicant) v. Goodfellow Inc. (Respondent)

Unit: "all employees of Goodfellow Inc. in the City of Burlington, save and except managers, persons above the rank of manager, office staff and sales persons" (17 employees in unit) (*Having regard to the agreement of the parties*)

3014-93-R: Weatherstrong Building Products Employees' Association (Applicant) v. Weatherstrong Building Products Ltd. (Respondent)

Unit: "all employees of Weatherstrong Building Products Ltd. in the Town of Smith Falls, save and except foremen, persons above the rank of foreman, office staff and students employed during the school vacation period" (33 employees in unit) (*Having regard to the agreement of the parties*)

3056-93-R: Labourers' International Union of North America, Local 527 (Applicant) v. 694280 Ontario Corporation (Respondent)

Unit: "all construction labourers in the employ of 694280 Ontario Corporation in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of 694280 Ontario Corporation in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

3061-93-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Cineplex Odeon Corporation (Respondent)

Unit: “all employees of Cineplex Odeon Corporation in the City of Brampton, save and except assistant managers and persons above the rank of assistant manager, and those persons for whom a trade union held bargaining rights on December 1, 1993” (23 employees in unit)

3090-93-R: United Steelworkers of America (Applicant) v. Ault Foods Limited (Respondent)

Unit: “all employees of Ault Foods Limited in the Town of Mitchell, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and persons in bargaining units for which any trade union held bargaining rights as of December 3, 1993” (8 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3105-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Reese Products of Canada Ltd. (Respondent)

Unit: “all employees of Reese Products of Canada Ltd. in the Town of Oakville, save and except group leaders, persons above the rank of group leader, office, clerical and sales staff” (47 employees in unit) (*Having regard to the agreement of the parties*)

3111-93-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Cineplex Odeon Corporation c.o.b. Scarborough Town Centre Cinemas (Respondent)

Unit: “all employees of Cineplex Odeon Corporation at the Scarborough Town Centre Cinemas in the Municipality of Metropolitan Toronto, save and except assistant managers and persons above the rank of assistant manager, and those persons for whom a trade union held bargaining rights on December 6, 1993” (27 employees in unit)

3113-93-R: Canadian Union of Public Employees (Applicant) v. 1056093 Ontario Inc. carrying on business as Empress Gardens Retirement Residence (Respondent)

Unit: “all employees of 1056093 Ontario Inc. carrying on business as Empress Gardens Retirement Residence in the City of Peterborough, save and except supervisors, persons above the rank of supervisor, Registered Nurses and the Secretary to the Administrator” (31 employees in unit) (*Having regard to the agreement of the parties*)

3117-93-R: Nipissing University Faculty Association (Applicant) v. Nipissing University (Respondent)

Unit: “all full-time academic staff and academic professional librarians employed by Nipissing University in the City of North Bay, in the District of Nipissing, save and except the President, Vice-president Academic, Registrar, Deans, Associate Deans, Administrative Assistants to the Deans, Director of Library Services, Assistant to the Director of Library Services, Academic Counsellors, Laboratory Technicians, Instructors and faculty members employed by Nipissing University on leave from or on secondment from another university or other employer” (63 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Notes*)

3128-93-R: Office and Professional Employees International Union (Applicant) v. Fasco Motors Limited (Respondent)

Unit: “all office, clerical and technical employees of Fasco Motors Limited in the City of Cambridge, save and except supervisors, persons above the rank of supervisor, Human Resources Personnel, Secretary to the President, Secretaries to the Vice-Presidents and persons for whom any trade union held bargaining rights as of December 7, 1993” (27 employees in unit) (*Having regard to the agreement of the parties*)

3135-93-R: Lac Des Isles Mines Employee’s Association (Applicant) v. Lac Des Iles Mines Ltd. (Respondent)

Unit: “all employees of Lac Des Isles Mines Ltd. at the mine site at Lac Des Isles, save and except foremen, persons above the rank of foreman, Safety Co-ordinator, Surveyors, Dispatcher, office and clerical workers, technical staff and food service workers” (27 employees in unit) (*Having regard to the agreement of the parties*)

3158-93-R: IWA-Canada (Applicant) v. Cashway Building Centres Inc. (Respondent)

Unit: “all employees of Cashway Building Centres Inc. in the Town of Huntsville, save and except Assistant Manager and persons above the rank of Assistant Manager” (9 employees in unit) (*Having regard to the agreement of the parties*)

3166-93-R: Service Employees Union, Local 663 (Applicant) v. Lennox and Addington Resources for Children (Respondent)

Unit: “all employees of Lennox and Addington Resources for Children in the Village of Odessa, save and except supervisors, persons above the rank of supervisor and persons regularly employed for not more than 24 hours per week” (2 employees in unit) (*Having regard to the agreement of the parties*)

3209-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Navistar International Corporation Canada (Respondent)

Unit: “all office and clerical employees of Navistar International Corporation Canada in the City of Chatham, save and except Managers, Supervisors, Superintendents, Secretary to Plant Manager, Controller, NIO Systems/Data Service Analyst, Systems Engineer, Senior Financial Analyst, Industrial Engineer, Safety Co-ordinator, Environmental Co-ordinator, Preventative Maintenance Planner, Human Resources Department personnel, Chief Engineer, Secretary to Chief Engineer, Product Engineer, Design Engineer, Project Engineer, Product Engineering Co-ordinator, Synchronous Manufacturing Co-ordinator” (11 employees in unit) (*Having regard to the agreement of the parties*)

3213-93-R: Christian Labour Association of Canada (Applicant) v. North America Construction (1993) Ltd. (Respondent)

Unit: “all construction labourers, carpenters and carpenters’ apprentices in the employ of North America Construction (1993) Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen” (5 employees in unit)

3224-93-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Vendrain Inc. (Respondent)

Unit: “all construction labourers in the employ of Vendrain Inc. in all sectors of the construction industry excluding the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

3235-93-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Cineplex Odeon Corporation (Respondent)

Unit: “all employees of Cineplex Odeon Corporation at the Cineplex Odeon Varsity Cinemas in the City of Toronto, save and except assistant manager and persons above the rank of assistant manager, and persons for whom any trade union held bargaining rights as of December 13, 1993” (21 employees in unit)

3243-93-R: Ontario Nurses’ Association (Applicant) v. Village Green Nursing Home (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity by the Village Green Nursing Home in the Village of Selby, save and except Director of Nursing and persons above the rank of Director of Nursing” (6 employees in unit) (*Having regard to the agreement of the parties*)

3248-93-R: Canadian Security Union (Applicant) v. Wackenhut of Canada Limited (Respondent)

Unit: “all security guards in the employ of Wackenhut of Canada Limited at 3231-3233 Eglinton Avenue East in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

3250-93-R: Canadian Security Union (Applicant) v. Wackenhut of Canada Limited (Respondent)

Unit: “all security guards in the employ of Wackenhut of Canada Limited at 4450 Tucana Court in the City of Mississauga, save and except supervisors and persons above the rank of supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

3253-93-R: United Steelworkers of America (Applicant) v. The Cadillac Fairview Corporation Limited (Respondent)

Unit: “all employees of The Cadillac Fairview Corporation Limited at 55 Wyndham Street North in the City of Guelph, save and except Building/Maintenance/Security Supervisor, persons above the rank of Building/Maintenance/Security Supervisor, office, clerical and sales staff” (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3254-93-R: United Steelworkers of America (Applicant) v. Catherine May Pharmacy Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Catherine May Pharmacy Ltd. in the City of Orillia, save and except Assistant Manager, persons above the rank of Assistant Manager, Head Cashier, Pharmacists, Head Beauty Advisor, office and clerical staff” (23 employees in unit) (*Having regard to the agreement of the parties*)

3257-93-R: International Union, United Plant Guard Workers of America, Local 1956 (Applicant) v. The Canadian Corps of Commissionaires (Respondent)

Unit: “all security guards employed by The Canadian Corps of Commissionaires in the Town of Goderich, save and except Site Supervisors and persons above the rank of Site Supervisors” (3 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3262-93-R: Service Employees Union, Local 210 (Applicant) v. La Chaumiere Retirement Residence (Respondent)

Unit: “all employees of La Chaumiere Retirement Residence in the Township of Maidstone, save and except supervisors, persons above the rank of supervisor and employees in bargaining units for which any trade union held bargaining rights as of December 10, 1993” (9 employees in unit) (*Having regard to the agreement of the parties*)

3298-93-R: London and District Service Workers’ Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Diversicare Incorporated (Respondent)

Unit: “all employees of Diversicare Incorporated at its Metcalfe Gardens Retirement Residence in the City of St. Thomas, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and secretary” (36 employees in unit) (*Having regard to the agreement of the parties*)

3316-93-R: Amalgamated Clothing and Textile Workers Union (Applicant) v. Perma Foam Limited (Respondent)

Unit: “all employees of Perma Foam Limited at Woodbridge in the City of Vaughan, save and except supervisors, persons above the rank of supervisor, office and sales staff” (29 employees in unit) (*Having regard to the agreement of the parties*)

3318-93-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Visca Electric, Division of Lino Visca Electric Inc. (Respondent)

Unit: “all journeymen electricians and electricians’ apprentices in the employ of Visca Electric, Division of Lino Visca Electric Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen electricians and electricians’ apprentices in the employ of Visca

Electric, Division of Lino Visca Electric Inc. in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (8 employees in unit)

3327-93-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. J-Dex Construction Ltd. (Respondent)

Unit: “all construction labourers in the employ of J-Dex Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of J-Dex Construction Ltd. in all sectors of the construction industry in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

3337-93-R: International Union of Bricklayers and Allied Craftsmen Local 29 Ontario (Applicant) v. Hoogovens Refractory Services Inc. (Respondent)

Unit: “all employees of Hoogovens Refractory Services Inc. in the City of Sault Ste. Marie, save and except supervisors, persons above the rank of supervisor, office, clerical and technical staff, sales staff and students” (7 employees in unit) (*Having regard to the agreement of the parties*)

3355-93-R: ACTRA Performers Guild (Applicant) v. Family Passions Inc. (Respondent)

Unit: “all employees of Family Passions Inc. employed as performers in the Municipality of Metropolitan Toronto and on any other production site in the Province of Ontario which is used by Family Passions Inc.” (43 employees in unit) (*Having regard to the agreement of the parties*)

3361-93-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: “all employees of Meadowvale Security Guard Services Inc. employed at 80 Alton Towers Circle in the Municipality of Metropolitan Toronto, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor” (2 employees in unit) (*Having regard to the agreement of the parties*)

3362-93-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: “all employees of Meadowvale Security Guard Services Inc. employed at 350 Webb Street in the City of Mississauga, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor” (2 employees in unit) (*Having regard to the agreement of the parties*)

3382-93-R: United Steelworkers of America (Applicant) v. Intertec Security & Investigation Ltd. (Respondent)

Unit: “all security guards of Intertec Security & Investigation Ltd. working at 550 Webb Drive in the City of Mississauga, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

3388-93-R: United Steelworkers of America (Applicant) v. Servacar Limited (Respondent)

Unit: “all employees of Servacar Limited at 1584 Merivale Road in the City of Nepean, save and except Managers and persons above the rank of Manager” (16 employees in unit) (*Having regard to the agreement of the parties*)

3389-93-R: United Steelworkers of America (Applicant) v. Servacar Limited (Respondent)

Unit: “all employees of Servacar Limited at 1545 Woodruffe Avenue in the City of Nepean, save and except Managers and persons above the rank of Manager” (12 employees in unit) (*Having regard to the agreement of the parties*)

3396-93-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 759 (Applicant) v. P.M.C. Builders & Developers Ltd. (Respondent)

Unit: “all ironworkers and ironworkers’ apprentices in the employ of P.M.C. Builders & Developers Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all ironworkers and ironworkers’ apprentices in the employ of P.M.C. Builders & Developers Ltd. in all sectors of the construction industry in the District of Kenora including the Patricia portion, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

3400-93-R: Local Union 636 of the International Brotherhood of Electrical Workers (Applicant) v. The Corporation of the Town of Huntsville (Respondent)

Unit: “all employees of The Corporation of the Town of Huntsville employed in the Water and Sewer Department, in the Town of Huntsville, save and except supervisors, persons above the rank of supervisor, office and clerical staff and persons for whom any trade union held bargaining rights as of December 31, 1993” (14 employees in unit) (*Having regard to the agreement of the parties*)

3401-93-R: Ontario Public Service Employees Union (Applicant) v. Petrolia and District Ambulance Service Inc. (Respondent)

Unit: “all employees of Petrolia and District Ambulance Service Inc. in the Town of Petrolia, save and except Supervisor, and persons above the rank of Supervisor” (6 employees in unit) (*Having regard to the agreement of the parties*)

3410-93-R: United Steelworkers of America (Applicant) v. Barnes Security Services Ltd. c.o.b. as Metropol Security (Respondent)

Unit: “all employees of Barnes Security Services Ltd. c.o.b. as Metropol Security in the City of St. Catharines, save and except Site Supervisor and persons above the rank of Site Supervisor, dispatchers, office, clerical and sales staff” (23 employees in unit) (*Having regard to the agreement of the parties*)

3413-93-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Cineplex Odeon Corporation (Respondent)

Unit: “all employees of Cineplex Odeon Corporation at the South Common Mall Cinemas in the City of Mississauga, save and except Assistant Managers, persons above the rank of Assistant Manager and persons for whom any trade union held bargaining rights as of January 4, 1994” (16 employees in unit) (*Having regard to the agreement of the parties*)

3421-93-R: United Steelworkers of America (Applicant) v. Patton’s Place Limited (Respondent)

Unit: “all salespersons employed by Patton’s Place Limited in the City of London, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (23 employees in unit) (*Having regard to the agreement of the parties*)

3458-93-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Cineplex Odeon Corporation (Respondent)

Unit: “all employees of Cineplex Odeon Corporation at the Eaton Centre, 1 Dundas Street West, in the Municipality of Metropolitan Toronto, save and except Assistant Manager and persons above the rank of Assistant Manager, and persons for whom any trade union held bargaining rights as of January 10, 1994” (38 employees in unit) (*Having regard to the agreement of the parties*)

3471-93-R: United Steelworkers of America (Applicant) v. Lewis Bakeries Limited (Respondent)

Unit: “all route salespeople of Lewis Bakeries Limited in the City of London, save and except Marketing Director, persons above the rank of Marketing Director” (26 employees in unit) (*Having regard to the agreement of the parties*)

3479-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Lear Seating Canada Ltd. (Respondent)

Unit: “all employees of Lear Seating Canada Ltd. in the City of Oakville, save and except supervisors, persons above the rank of supervisor, office, sales and clerical staff” (96 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2966-93-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Peterborough Civic Hospital (Respondent) v. International Union of Operating Engineers, Local 796 (Intervener)

Unit: “all stationary engineers of the Peterborough Civic Hospital in the City of Peterborough, save and except the chief engineer and persons above the rank of chief engineer” (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	3

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1467-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Sifton Properties Limited (Respondent)

Unit: “all employees of Sifton Properties Limited employed at Westmount Shopping Centre, 785 Wonderland Road South, London, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff, engineering and technical staff, and sales staff” (35 employees in unit)

Number of names of persons on revised voters' list	34
Number of persons who cast ballots	34
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	16

3004-93-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. L & F Canada Inc. (Respondent)

Unit: “all employees of L & F Canada Inc. in the Town of Aurora, save and except supervisors, persons above the rank of supervisor, office, sales staff and persons for whom any trade union held bargaining rights as of November 26, 1993” (11 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	0

Applications for Certification Dismissed Without Vote

1583-93-R: Retail, Wholesale and Department Store Union (Applicant) v. Ault Foods Limited (Respondent)

1991-93-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sears Canada (Respondent)

2523-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Cancore Building Services Ltd. (Respondent)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1948-93-R: Independent Paperworkers of Canada, Local 2 (Applicant) v. The Beaver Wood Fibre Company Limited (Respondent)

Unit #1: "all employees of The Beaver Wood Fibre Company Limited in Thorold, save and except Bd. Mill Superintendent, Plant Engineer, Process Engineer, Chief Stationary Engineer, Controller, Secretary to Plant and Office Manager, Plant Manager, Office Manager, Plant Nurse, Sales Manager, Chemist, Personnel Manager, Maintenance Superintendent and Watchman" (77 employees in unit) (*Having regard to the agreement of the parties*)

3079-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Hard Rock Paving Company Limited (Respondent) v. Canadian Brotherhood of Railway, Transport and General Workers (Intervener)

Unit #1: "all employees of Hard Rock Paving Company Limited engaged in its roadbuilding operations in and out of the Regional Municipality of Niagara save and except foremen and persons above the rank of foreman, office and sales staff and persons regularly employed for not more than 24 hours per week" (70 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	54
Number of persons who cast ballots	52
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	52
Number of ballots marked in favour of applicant	7
Number of ballots marked in favour of intervener	45

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1542-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. MS Maintenance Systems Inc. (Respondent)

Unit #1: "all employees of MS Maintenance Systems Inc. engaged in cleaning and maintenance at Merrill Lynch, Canada Tower, Sunlife Centre at 200 King Street and Sunlife Tower at 150 King Street, Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff and all persons regularly employed for not more than 24 hours per week" (61 employees in unit)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	24
Number of segregated ballots cast by persons whose names do not appear on voters' list	14
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	4

Unit #2: (see Bargaining Agents Certified without vote)

2369-93-R: Canadian Union of Public Employees (Applicant) v. Niagara Centre for Youth Care (Respondent)

Unit: "all employees of the Niagara Centre for Youth Care in the Regional Municipality of Niagara, save and except Treatment Co-ordinator and persons above the rank of Treatment Co-ordinator, Executive Secretary to the Executive Director, Bookkeeper, Team Leader and Information Systems Co-ordinator" (40 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	35
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	35
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	18
Number of names of persons on revised voters' list	41
Number of persons who cast ballots	35
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	35
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	18

2586-93-R: Graphic Communications International Union, Local N-1 (Applicant) v. Michelin Tires (Canada) Ltd. (Respondent)

Unit: "all employees of Michelin Tires (Canada) Ltd. at its facility at 55 West Drive, Brampton, save and except foremen and persons above the rank of foreman and office staff" (40 employees in unit)

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	38
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	25

2665-93-R: International Ladies Garment Workers Union (Applicant) v. ETAC Sales Ltd. (Respondent)

Unit: "all employees of ETAC Sales Ltd. at 20 and 30 Bertrand Avenue in the City of Scarborough, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, sales, office and clerical staff" (60 employees in unit)

Number of names of persons on revised voters' list	68
Number of persons who cast ballots	63
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	62
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	45
Number of ballots segregated and not counted	1

2795-93-R: Brewery, General and Professional Workers' Union (Applicant) v. BevPac Beverages Ltd. (Respondent)

Unit: "all employees of BevPac Beverages Ltd. in the City of London, save and except supervisors and persons above the rank of supervisor, office, clerical and sales staff" (10 employees in unit)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	0

2865-93-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses, North Bay Branch (Respondent) v. Group of Employees (Objectors)

Unit: “all registered and graduate nursing assistants employed in a nursing capacity by the Victorian Order of Nurses, North Bay Branch in the District of Nipissing and the District of Parry Sound, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (14 employees in unit)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	13
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	10

Applications for Certification Withdrawn

1654-93-R: Labourers' International Union of North America, Local 607 (Applicant) v. PCL Construction Ltd., PCL Constructors Eastern Inc. and PCL Constructors Inc. (Respondent)

2722-93-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 800 (Applicant) v. Timmins and District Hospital, L'Hopital de Timmins et du District (Respondent) v. United Steelworkers of America (Intervener)

2993-93-R: International Beverage Dispensers' & Bartenders' Union, Local 280 (Applicant) v. Old Stone Inn Inc. (Respondent)

3035-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Forest City Forming Ltd. (Respondent)

3036-93-R: Teamsters Local Union 938 (Applicant) v. 922300 Ontario Limited o/a Hundal Co. (Respondent)

3125-93-R: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and The Ontario Provincial Conference of the I.U.B.A.C. (Applicants) v. Big H Construction Inc. (Respondent)

3233-93-R: United Steelworkers of America (Applicant) v. Kalson Group Ltd. (Respondent) v. Group of Employees (Objectors)

3370-93-R: Canadian Brotherhood of Railway, Transport and General Workers (Applicant) v. The Salvation Army, Ottawa Booth Centre (Respondent)

3406-93-R: IWA-Canada (Applicant) v. Wilberforce Veneer (Respondent)

3440-93-R: Smith Construction Employees' Association (Applicant) v. Smith Construction (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

2440-93-R: N & D Employees' Association (Applicant) v. N & D Supermarket Limited (Respondent) (*Granted*)

2619-93-R: Ontario Public Service Employees Union (Applicant) v. The Governing Council of the Salvation Army in Canada and Bermuda (Respondent) (*Granted*)

3091-93-R: United Steelworkers of America (Applicant) v. Wackenhut of Canada Limited (Respondent) (*Granted*)

3092-93-R: United Steelworkers of America (Applicant) v. Group 4 C.P.S. Ltd. (Respondent) (*Granted*)

3165-93-R: Service Employees Union, Local 663 (Applicant) v. Lennox and Addington Resources for Children (Respondent) (*Granted*)

3210-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Navistar International Corporation Canada (Respondent) (*Granted*)

FIRST AGREEMENT - DIRECTION

3334-93-FC: IWA-Canada (Applicant) v. Gilles R. Mayer Sanitation Ltee. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3575-92-R: United Brotherhood of Carpenters and Joiners of America, Local 2222 (Applicant) v. Ellis-Don Limited, Ellis-Don Construction Ltd., Ellis-Don Forming Ltd., Jamesway General Contracting Inc., B & D Support Services Inc. (Respondents) v. Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Locals 1059 and 1081 (Intervener) (*Withdrawn*)

3714-92-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. St. Lawrence Drywall and H & R Contracting (Respondents) (*Granted*)

0677-93-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Locals 1059 & 1081 (Applicant) v. Ellis-Don Limited, Ellis-Don Construction Ltd., Ellis-Don Forming Ltd., Jamesway General Contracting Inc. and B & D Support Services Inc. (Respondents) (*Withdrawn*)

1563-93-R: Ontario District Council of the International Ladies' Garment Workers' Union and Locals 14, 83 & 92 (Applicant) v. S.R. Gent (Canada) Inc. and High Point Fashions Ltd. (Respondents) (*Withdrawn*)

2010-93-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sears Canada; New Vision Construction Co. Limited (Respondents) (*Terminated*)

2027-93-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. D.K.W. Schwarz Steel Construction Inc., Red Iron (Respondents) (*Granted*)

2457-93-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Genspec Construction Incorporated, Genspec Construction Ltd. (Respondents) (*Granted*)

2682-93-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Pisapia Inc., Pisapia (Canada) Limited (Respondents) (*Withdrawn*)

3153-93-R: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Phil Fletcher Contracting Ltd., Andrews Backhoe Service Inc., Irish Creek Enterprises Inc. (Respondents) (*Granted*)

3375-93-R: Labourers' International Union of North America, Local 527 (Applicant) v. Denis Brisbois Contractor (1992) Limited, Denis Brisbois Contractor Limited, Denis Brisbois Holdings Limited (Respondent) (*Granted*)

3491-93-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Newcarl Co. Ltd. and 812728 Ontario Inc. (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener) (*Granted*)

SALE OF A BUSINESS

1850-92-R: Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel & Restau-

rant Employees' & Bartenders' International Union (Applicant) v. Miriam Anna Otegui, Bronzegate Enterprises Inc. (Respondents) (*Withdrawn*)

3575-92-R: United Brotherhood of Carpenters and Joiners of America, Local 2222 (Applicant) v. Ellis-Don Limited, Ellis-Don Construction Ltd., Ellis-Don Forming Ltd., Jamesway General Contracting Inc., B & D Support Services Inc. (Respondents) v. Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Locals 1059 and 1081 (Intervener) (*Withdrawn*)

3714-92-R: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. St. Lawrence Drywall and H & R Contracting (Respondents) (*Granted*)

0677-93-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Locals 1059 & 1081 (Applicant) v. Ellis-Don Limited, Ellis-Don Construction Ltd., Ellis-Don Forming Ltd., Jamesway General Contracting Inc. and B & D Support Services Inc. (Respondents) (*Withdrawn*)

1563-93-R: Ontario District Council of the International Ladies' Garment Workers' Union and Locals 14, 83 & 92 (Applicant) v. S.R. Gent (Canada) Inc. and High Point Fashions Ltd. (Respondents) (*Withdrawn*)

2010-93-R: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Sears Canada; New Vision Construction Co. Limited (Respondents) (*Terminated*)

2027-93-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. D.K.W. Schwarz Steel Construction Inc., Red Iron (Respondents) (*Granted*)

2457-93-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Genspec Construction Incorporated, Genspec Construction Ltd. (Respondents) (*Granted*)

2625-93-R: Local 280 of the International Beverage Dispensers' and Bartenders' Union of the Hotel & Restaurant Employees' & Bartenders' International Union (Applicant) v. Romspen Management Services Limited (Respondent) (*Withdrawn*)

2682-93-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Pisapia Inc., Pisapia (Canada) Limited (Respondents) (*Withdrawn*)

3153-93-R: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Phil Fletcher Contracting Ltd., Andrews Backhoe Service Inc., Irish Creek Enterprises Inc. (Respondents) (*Granted*)

3375-93-R: Labourers' International Union of North America, Local 527 (Applicant) v. Denis Brisbois Contractor (1992) Limited, Denis Brisbois Contractor Limited, Denis Brisbois Holdings Limited (Respondent) (*Granted*)

3491-93-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Newcarl Co. Ltd. and 812728 Ontario Inc. (Respondents) v. Labourers' International Union of North America, Local 183 (Intervener) (*granted*)

SECTION 64.2 - SUCCESSOR RIGHTS/CONTRACT SERVICES

3049-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Leonard's Building Maintenance Limited and Double M & M Inc. (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2742-93-R: Randy Cruden (Applicant) v. Retail, Wholesale and Department Store Union, AFL-CIO-CLC, Local 1688 and Retail, Wholesale and Department Store Union/Canada Local 1688 and Retail, Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 1688 (Respondents) v. Hamilton Yellow Cab Company Limited and Transportation Unlimited Inc. (Intervener)

Unit: “all dependent contractors of the Company who are operating as single plate owner operators, including those operators who lease a taxi-cab plate, save and except supervisors, garage, office and dispatch staff, and persons above the rank of supervisor” (43 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	44
Number of persons who cast ballots	40
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	36
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of respondent	13
Number of ballots marked against respondent	23
Number of ballots segregated and not counted	4

2812-93-R: Susan Caterina (Applicant) v. The United Food and Commercial Workers Union Local 206 (Respondent) v. Knob Hill Farms Limited (Intervener)

Unit: “all employees of Knob Hill Farms Limited at Oshawa, Ontario, save and except Assistant Store Manager, persons above the rank of Assistant Store Manager and office staff” (150 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	153
Number of persons who cast ballots	145
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	145
Number of spoiled ballots	2
Number of ballots marked in favour of respondent	44
Number of ballots marked against respondent	99

2867-93-R: Members of Bargaining Unit-Local 512 (Applicant) v. Ontario Public Service Employees Union (Respondent) v. The Muscular Dystrophy Association of Canada (Intervener)

Unit: “all employees of The Muscular Dystrophy Association of Canada in its national office in the Municipality of Metropolitan Toronto, save and except Supervisors, persons above the rank of Supervisor, Executive Assistant, two (2) Management Secretaries, persons employed for not more than 24 hours per week and students employed during the school vacation period” (7 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	4

3027-93-R: Susan Dentelbeck (Applicant) v. Canadian Union of Public Employees, Local 1281 (Respondent) v. University of Toronto Staff Association (Intervener)

Unit: “all regular part-time and full-time employees of the University of Toronto Staff Association, save and except those employees who exercise managerial functions, those designated “replacement” and “casual” under this article, and those employees designated as “contract” unless the contract is for a period of more than three months” (3 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	3
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Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	2

3033-93-R: Gilles Robinson, Helene Morin, Roberta Scott, Henrietta Pound, Francoise Fillion, Yvette Magrichuk, Susan Moncrieff, Brigitte Jean-Duguay, Irene Madere, Richard Gravel, Nicole Cousineau, Diane Dicaire (Applicants) v. Office and Professional Employees International Union, Local 225 (Respondent) v. Canada Employment and Immigration Union (Intervener) (*Withdrawn*)

3394-93-R: Hardial Samra, Surjeet Chhokar, and Other Employees of Caterair Chateau Canada Limited (Applicant) v. Hotel Employees', Restaurant Employees' Union, Local 75, of the Hotel Employees' Restaurant Employees' International Union AFL.-C.I.O.-C.L.C.- O.F.L. (Respondent) v. Caterair Chateau Canada Limited (Intervener) (*Withdrawn*)

3495-93-R: Carlos A. Teixeira (Applicant) v. United Plant Guard Workers of America Local 1956 (U.P.G.W.A) (Respondent) (*Dismissed*)

APPLICATIONS CONCERNING REPLACEMENT WORKERS

3391-93-U: Retail Wholesale and Department Store Union, United Dairy and Creamery Workers Local 477 (Applicant) v. Ault Foods Limited, Gay Lea Foods Co-operative Limited, and Dickson Transport Inc. (Respondents) (*Terminated*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1436-92-U: Canadian Security Union (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent) (*Withdrawn*)

1637-92-U: Carole Longpré (Applicant) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Respondent) (*Dismissed*)

1685-92-U: Laundry and Linen Drivers and Industrial Workers Union, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Canadian Linen Supply Company Limited (Respondent) (*Withdrawn*)

1799-92-U: Amrik Singh (Applicant) v. United Steelworkers of America (Respondent) (*Dismissed*)

1883-92-U: Steve Castle (Applicant) v. United Steelworkers of America, Local 2858 (Respondent) v. Algoods, A Division of Alcan Aluminium Limited (Intervener) (*Dismissed*)

2766-92-U: Don Young (Applicant) v. Teamsters Local 938 (Respondent) (*Withdrawn*)

3767-92-U: Service Employees International Union, Local 204 and Local 532 (Applicant) v. The Canadian Red Cross Society Ontario Division, Victorian Order of Nurses Brant-Haldimand-Norfolk, Comcare (Canada) Limited, Med Care Partnership, The Visiting Homemakers Association of Hamilton-Wentworth, Hamilton-Wentworth Home Care Program - Victorian Order of Nurses and Victorian Order of Nurses Respite Program, The Regional Municipality of Hamilton-Wentworth, Olsten Health Care Services, Medical Personnel Pool (Hamilton) Ltd., Mohawk Medical Services, Para-Med Health Services and Brant County Home Care Program, Veterans Affairs Canada (Respondents) (*Granted*)

0057-93-U: Service Employees Union, Local 210 (Applicant) v. Keytours Inc. (Respondent) (*Dismissed*)

0504-93-U: Lennox Sukdeo (Applicant) v. Schneider Employees' Association/Charles Losier (Respondent) v. J. M. Schneider Inc. (Intervener) (*Dismissed*)

0702-93-U: United Steelworkers of America (Applicant) v. Royalguard Vinyl Co., A Division of Royplast Limited (Respondent) (*Granted*)

1417-93-U: Grant Paving and Materials Limited (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) (*Dismissed*)

1699-93-U: Barry Donald Craib (Applicant) v. The Corporation of the City of Peterborough (Respondent) (*Dismissed*)

1918-93-U: Antonio Vicente (Applicant) v. United Steelworkers of America and (Respondent) v. Cambridge Brass (Intervener) (*Dismissed*)

2076-93-U: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. 968684 Ontario Inc. c.o.b. Studebakers (Respondent) (*Withdrawn*)

2389-93-U: Deryck McLaughlin (Applicant) v. Teamsters Local Union 938 (Respondent) v. Pepsi-Cola Canada Beverages (Ontario) Ltd. (Intervener) (*Dismissed*)

2458-93-U: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Genspec Construction Incorporated, Genspec Construction Ltd. (Respondents) (*Withdrawn*)

2489-93-U: Medlin Morris (Applicant) v. United Food & Commercial Workers International Union Local 114P (Respondent) (*Dismissed*)

2526-93-U: Tjoei Lauw (Applicant) v. United Steelworkers of America Local Union No. 14049 (Respondent) (*Withdrawn*)

2600-93-U: Doug Fanjoy, Michel Deveraux, Marcel Senecal, Robert Matte, Edgar Palmer, Daniel Boutin, Paul Belisle, Rhéal Corbeil, Marc Gravel, Edgar Blais, Raymond Miron, Phillippe Simard, Gerry Levac, Jacques Ethier, Marco Banchini, André Massie, Gilles Paquette, Pierre Rochon, Gilles Gratton and Claude Tardiff (Applicant) v. Teamsters' Local Union No. 230, Ready Mix Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers and Miron Concrete (A Division of Essroc Canada Inc.) (Respondents) (*Dismissed*)

2632-93-U: Mieczyslaw Kupsta (Applicant) v. Graphics Communications International Union, Lawson Mardon Flexible Packaging (Respondents) (*Dismissed*)

2651-93-U: Kevin J. Forbes (Applicant) v. Design Craft Ltd., George Dixon (International Labourer's Union 506 Rep) (Respondents) (*Withdrawn*)

2713-93-U: Canadian Union of Public Employees and its Local 2225-11 (Applicant) v. Golfview Group Homes Ltd. (Respondent) (*Withdrawn*)

2769-93-U: Teamsters Local 847 Laundry and Linen Drivers and Industrial Workers (Applicant) v. Cichon Enterprises Ltd. c.o.b. as Imperial Dust Control (Respondent) (*Withdrawn*)

2818-93-U: Ontario Liquor Boards Employees' Union (Applicant) v. Fort Erie Duty Free Shoppe Inc. (Respondent) (*Withdrawn*)

2827-93-U: Chris Hebblewaite (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers of Canada (CAW - Canada) (Respondent) (*Withdrawn*)

2897-93-U: International Union of Operating Engineers, Local 793 (Applicant) v. Ross Memorial Hospital (Respondent) v. Canadian Union of Public Employees (Intervener) (*Withdrawn*)

2917-93-U; 2918-93-U: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelwork-

ers of America (Applicant) v. 947645 Ontario Limited, c.o.b. as Checker Limousine & Airport Service (Respondent) (*Granted*)

2969-93-U: Reginald Fitzgerald (Applicant) v. Alex Keeney, Local 200, C.A.W. (Respondent) v. Ford Motor Company Ltd. (Intervener) (*Withdrawn*)

3058-93-U: Ontario Public Service Employees Union (Applicant) v. The Ministry of Solicitor General and Correctional Services and Nu-Mark Food Services Limited (Respondents) (*Withdrawn*)

3065-93-U: Teamsters Local Union 938 (Applicant) v. 922300 Ontario Limited o/a Hundal Co. (Respondent) (*Withdrawn*)

3097-93-U: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Mico Inc. c.o.b. as Loeb Club Plus - Westminster (Respondent) (*Withdrawn*)

3118-93-U: Service Employees Union, Local 183 (Applicant) v. Ian Martin Limited (Respondent) (*Withdrawn*)

3136-93-U: Fatima Pereira (Applicant) v. Oakville Lifecare Centre (Respondent) v. Service Employees' International Union - Local 532 (Intervener) (*Withdrawn*)

3140-93-U: United Food and Commerical Workers International Workers, Local 175 (Applicant) v. Mar-Brite Foods Co-Operative Inc. (Respondent) (*Withdrawn*)

3151-93-U: Service Employees International Union, Local 204 Affiliated with the A. F. of L., C.I.O., C.L.C. (Applicant) v. Casa Verde Health Centre Inc., Paragon Health Centre Inc., Paragon Health Care (Ontario) Inc., 862645 Ontario Ltd. and Gerald Harquail (Respondents) (*Withdrawn*)

3152-93-U: Ontario Public Service Employees Union (Applicant) v. Meaford and Beaver Valley Community Support Services (Respondent) (*Withdrawn*)

3182-93-U: IWA Canada, Local 2693 (Applicant) v. Kimberly Clark Forest Products Inc. (Respondent) (*Withdrawn*)

3230-93-U; 3312-93-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 (Applicant) v. Rosen Dairy Products Limited (Respondent) (*Withdrawn*)

3241-93-U: Frank Inserra (Applicant) v. Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Locals 414, 422, 440, 448, 461, 483, 488, 1000, 1688, (Respondent) v. Great Atlantic & Pacific Company of Canada Limited operating as Dominion Stores (Intervener) (*Terminated*)

3259-93-U: Prodanovic Branko (Applicant) v. Local 727 United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada A.F. of L., CIO, C.F.L. (Respondent) v. Taylor Forge Canada Inc. (Intervener) (*Withdrawn*)

3265-93-U: International Union of Bricklayers and Allied Craftsmen, Local #2, Ontario and the Ontario Provincial Conference of the I.U.B.A.C. (Applicant) v. Big H Construction Inc. (Respondent) (*Withdrawn*)

3274-93-U: Peter P. Hladun (Applicant) v. United Steelworkers of America (Respondent) v. Pirelli Cables Inc. (Intervener) (*Withdrawn*)

3276-93-U: Mrs. Denise Down (Applicant) v. Service Employees International Union Local 532 (Respondent) (*Withdrawn*)

3354-93-U: Famous Players Inc. (Applicant) v. International Alliance of Theatrical Stage and Moving Picture Machine Operators of the United States and Canada, Local 173 (Respondent) (*Withdrawn*)

3358-93-U: Teamsters Local Union 938 (Applicant) v. 922300 Ontario Limited o/a Hundal Co. (Respondent) (*Withdrawn*)

3379-93-U: United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. Ross Mechanical Systems Ltd. (Respondent) (*Withdrawn*)

3381-93-U: United Steelworkers of America (Applicant) v. Morlee Corporation (Respondent) (*Withdrawn*)

3407-93-U: Kathy Ann Vogt (Applicant) v. The Great War Memorial Hospital of Perth District (Respondent) (*Withdrawn*)

3415-93-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Buntin Reid Paper Division of Domtar Inc. (Respondent) (*Withdrawn*)

3432-93-U: Firoz Ramji (Applicant) v. Royal York Hotel (Respondent) (*Withdrawn*)

3444-93-U: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Cineplex Odeon Corporation (Respondent) (*Withdrawn*)

3478-93-U: Bradley G. Yaciuk (Applicant) v. Xerox Can. Management Team (Respondent) (*Dismissed*)

3489-93-U: Brian Edwin O'Neil (Applicant) v. City of Cornwall (Respondent) (*Withdrawn*)

3519-93-U: Ontario District Council of the International Ladies' Garment Workers' Union and Locals 14, 83 & 92 (Applicant) v. S.R. Gent (Canada) Inc. and High Point Fashions Ltd. (Respondents) (*Withdrawn*)

3541-93-U: United Steelworkers of America (Applicant) v. 913719 Ontario Limited c.o.b. as Adults Only Video (Respondent) (*Withdrawn*)

3551-93-U: The North York Civic Employees Union, Canadian Union of Public Employees Local 94 (Applicant) v. The Corporation of the City of North York (Respondent) (*Withdrawn*)

APPLICATION FOR INTERIM ORDER

2599-93-M: Doug Fanjoy, Michel Deveraux, Marcel Senecal, Robert Matte, Edgar Palmer, Daniel Boutin, Paul Belisle, Rhéal Corbeil, Marc Gravel, Edgar Blais, Raymond Miron, Phillippe Simard, Gerry Levac, Jacques Ethier, Marco Banchini, André Massie, Gilles Paquette, Pierre Rochon, Gilles Gratton and Claude Tardiff (Applicant) v. Teamsters' Local Union No. 230, Ready Mix Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers and Miron Concrete (A Division of Essroc Canada Inc.) (Respondents) (*Dismissed*)

3414-93-M: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Buntin Reid Paper Division of Domtar Inc. (Respondent) (*Withdrawn*)

3464-93-M: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. Now Communications Inc. (Respondent) (*Terminated*)

3552-93-M: The North York Civic Employees Union, Canadian Union of Public Employees Local 94 (Applicant) v. The Corporation of the City of North York (Respondent) (*Withdrawn*)

3647-93-M: United Steelworkers of America (Applicant) v. Distinctive Designs Furniture Inc. (Respondent) (*Withdrawn*)

3670-93-M: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Cable Com International Networking Inc. (Respondent) (*Terminated*)

JURISDICTIONAL DISPUTES

2505-90-JD: Labourers' International Union of North America, Local 1089 (Applicant) v. International Brotherhood of Electrical Workers, Local 530 and Adam Clark Company Ltd. (Respondents) (*Dismissed*)

3380-93-JD: Labourers' International Union of North America, Local 527 (Applicant) v. PCL Constructors Eastern Inc. and International Union of Operating Engineers, Local 793 (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0132-89-M: Ontario Public Service Employees Union (Applicant) v. Fanshawe College of Applied Arts & Technology (Respondent) (*Granted*)

2712-90-M: York University Staff Association (Applicant) v. York University (Respondent) (*Granted*)

0791-91-M: York University Staff Association (Applicant) v. York University (Respondent) (*Granted*)

0602-92-M: York University Staff Association (Applicant) v. York University (Respondent) (*Granted*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0603-93-OH: Pamela Green (Applicant) v. General Motors of Canada Limited, Brian Pringle, Brian Baldoni and Warren Masters (Respondent) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 199 (Intervener) (*Dismissed*)

0795-93-OH: Alicja Konieczna (Applicant) v. Capital Tool and Design Limited (Respondent) (*Withdrawn*)

0958-93-OH: David Penney (Applicant) v. Schrader Bellows (Canada) Inc. Parker-Hannifin (Canada) Inc. (Respondent) (*Withdrawn*)

2429-93-OH: W. H. McNaught (Applicant) v. Toronto Transit Commission (Respondent) (*Withdrawn*)

2810-93-OH: Joseph Connors (Applicant) v. Precision Graphics and Lithography Ltd. (Respondent) (*Withdrawn*)

3231-93-OH: Mr. Christopher Wylie (Applicant) v. Wayne Electric Co. Limited (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

0988-92-G: International Union of Elevator Constructors Local Union 90 (Applicant) v. Dover Corporation (Canada) Ltd. (Respondent) (*Withdrawn*)

1167-92-G: Labourers' International Union of North America, Local 247 (Applicant) v. Bellai Brothers Ltd. (Respondent) v. Labourers' International Union of North America, Local 527 (Intervener) (*Dismissed*)

1730-92-G: United Brotherhood of Carpenters and Joiners of America, Local Union 93 and Sean McKenny (Applicants) v. B.M.I. Construction Company Limited (Respondent) (*Withdrawn*)

3715-92-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. H & R Contracting (Respondent) (*Granted*)

0218-93-G; 1635-93-G: Labourers' International Union of North America, Local 527 (Applicant) v. Duron Ottawa Ltd. (Respondent) (*Granted*)

0344-93-G: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. Pierre Lareau Inc. (Respondent) (*Granted*)

0345-93-G: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. Durie Tile and Marble Ltd. (Respondent) (*Withdrawn*)

0359-93-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Gall Construction Ltd. operating as Acapulco Recreational Contractors (Respondent) (*Withdrawn*)

0676-93-G: Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Locals 1059 & 1081 (Applicant) v. Ellis-Don Limited, Ellis-Don Construction Ltd., Ellis-Don Forming Ltd., Jamesway General Contracting Inc. and B & D Support Services Inc. (Respondents) (*Withdrawn*)

0731-93-G: United Brotherhood of Carpenters and Joiners of America, Locals 2222, 2050, 2451, 785 and 2486 (Applicant) v. Ellis-Don Limited, Ellis-Don Construction Limited, Ellis-Don Forming Ltd., B & D Support Services Inc., Jamesway General Contracting Incorporated (Respondents) (*Withdrawn*)

1217-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. D.K.W. Schwarz Steel Construction Inc. (Respondent) (*Granted*)

1638-93-G: Labourers' International Union of North America, Local 527 (Applicant) v. Da Costa Forming Limited (Respondent) (*Withdrawn*)

1666-93-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Dundas Valley Insulation (Respondent) (*Granted*)

2028-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. D.K.W. Schwarz Steel Construction Inc., Red Iron (Respondents) (*Withdrawn*)

2121-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. Erredia Forming Limited (Respondent) (*Granted*)

2347-93-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Research-Cottrell (Canada) Ltd. (Respondent) (*Withdrawn*)

2437-93-G: Millwrights District Council of Ontario on its own behalf and on behalf of its Local 1007 (Applicant) v. E.S. Fox Limited (Respondent) (*Granted*)

2442-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Coast to Coast Installation Inc. (Respondent) (*Granted*)

2456-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Genspec Construction Ltd. (Respondent) (*Granted*)

2469-93-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Tratim Sheet Metal Inc., Canadian Tech Air Systems Inc. (Respondents) (*Granted*)

2470-93-G; 2936-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ideal Railings Limited (Respondent) (*Withdrawn*)

2622-93-G: Bricklayers, Masons Independent Union of Canada Local 1 (Applicant) v. Edenrose Masonry Ltd. (Respondent) (*Granted*)

2681-93-G: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Pisapia Inc., Pisapia (Canada) Limited (Respondents) (*Withdrawn*)

2684-93-G: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Torino Dry-wall Ltd. (Respondent) (*Granted*)

2686-93-G: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Nelmar Dry-wall Company Limited (Respondent) (*Granted*)

2688-93-G: International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Suburban Lathing & Acoustics Ltd. (Respondent) (*Granted*)

2709-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local Union 67 (Applicant) v. Philwal Mechanical Limited (Respondent) (*Granted*)

2712-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ellis-Don Limited (Respondent) (*Withdrawn*)

2717-93-G: Operative Plasterers and Cement Masons International Association of the United States and Canada Local 598 (Applicant) v. Doward Restoration Inc. (Respondent) (*Granted*)

2803-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Ontario Paving Inc. (Respondent) (*Granted*)

2912-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. Ellis Don Construction Limited (Respondent) (*Withdrawn*)

2914-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters & Joiners of America (Applicant) v. Durigon Holdings Ltd., Perlane Construction Inc. (Respondents) (*Granted*)

2920-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. PCL Constructors Eastern Inc. (Respondent) (*Withdrawn*)

3137-93-G: United Brotherhood of Carpenters and Joiners of America Local 1256 (Applicant) v. Alvaro Contractors Ltd. (Respondent) (*Withdrawn*)

3142-93-G: Sheet Metal Workers' International Association, Local 562 (Applicant) v. Richards Mechanical Services Ltd. (Respondent) (*Granted*)

3147-93-G: Labourers' International Union of North America, Local 597 (Applicant) v. Teperman and Sons Inc. (Respondent) (*Withdrawn*)

3154-93-G; 3171-93-G; 3172-93-G: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Phil Fletcher Contracting Ltd. (Respondent); United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Andrews Backhoe Service Inc. (Respondent); United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Irish Creek Enterprises Inc. (Respondent) (*Withdrawn*)

3189-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. EMC Electric (Respondent) (*Withdrawn*)

3191-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Lad Electric Limited (Respondent) (*Withdrawn*)

3197-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Amberland Electric Inc. (Respondent) (*Withdrawn*)

3198-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. John W. Baldwin Electric Company Limited (Respondent) (*Withdrawn*)

3199-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Canber Electric Inc. (Respondent) (*Withdrawn*)

3206-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Canadian Conduit & Cable Constructors Inc. (Respondent) (*Granted*)

3207-93-G: United Brotherhood of Carpenters and Joiners of America Local 93 (Applicant) v. Newcarl Co. Ltd. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener) (*Granted*)

3221-93-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Felco Elevator Company (Respondent) (*Withdrawn*)

3225-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. Pine Ridge Construction (1986) Ltd. (Respondent) (*Dismissed*)

3237-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Gibson Rebar Services Ltd. (Respondent) (*Withdrawn*)

3239-93-G: United Brotherhood of Carpenters, Local 785 (Applicant) v. D & C Reinforcing Limited (Respondent) (*Withdrawn*)

3240-93-G: The International Union of Bricklayers and Allied Craftsmen Local #20 and the Ontario Provincial Conference of Bricklayers and Allied Craftsmen (Applicant) v. Varamae Construction Company Limited (Respondent) (*Terminated*)

3275-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Bramalea Iron Works Ltd. (Respondent) (*Granted*)

3277-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Arosan Enterprises Ltd. (Respondent) (*Granted*)

3285-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Ellis Don Limited (Respondent) (*Withdrawn*)

3286-93-G: Labourers' International Union of North America, Local 527 (Applicant) v. A.B.T. Tile & Marble Co. Ltd. (Respondent) (*Granted*)

3287-93-G: Labourers' International Union of North America, Local 527 (Applicant) v. Set Construction Ltd. (Respondent) (*Granted*)

3290-93-G: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Trans Ontario Ceiling & Wall Systems Inc. (Respondent) (*Withdrawn*)

3291-93-G: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Trans Ontario Ceiling & Wall Systems Inc. (Respondent) (*Withdrawn*)

3293-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. John Maggio Excavating Ltd. (Respondent) (*Granted*)

3302-93-G: The IBEW Electrical Power Systems Construction Council of Ontario and International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Ontario Hydro and Electrical Power Systems Construction Association (Respondents) (*Withdrawn*)

3307-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Braunstein & Braunstein Construction Limited (Respondent) (*Granted*)

3324-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. G.T.C. Flooring Ltd. (Respondent) (*Granted*)

3330-93-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Kennedy Electric Limited (Respondent) (*Granted*)

3331-93-G: Local 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Johnson Controls Ltd. (Respondent) (*Withdrawn*)

3357-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Lindsay Brothers Construction Ltd. (Respondent) (*Granted*)

3378-93-G: Labourers' International Union of North America, Local 527 (Applicant) v. G. & N. Contracting (Respondent) (*Granted*)

3385-93-G: International Brotherhood of Painters and Allied Trades, Local 200, Ottawa (Applicant) v. Preston and Lief Glass (Respondent) (*Granted*)

3399-93-G: Millwright District Council of Ontario on its own behalf and on behalf of its Local 2309 (Applicant) v. Calorific Construction Limited (Respondent) (*Granted*)

3430-93-G: Labourers' International Union of North America, Local 597 (Applicant) v. Structform International Limited (Respondent) (*Withdrawn*)

3431-93-G: Labourers' International Union of North America, Local 597 (Applicant) v. Varamae Construction (Respondent) (*Withdrawn*)

3445-93-G: Marble, Tile & Terrazzo Local Union No. 31 (Applicant) v. Suburban Marble & Tile Co. Ltd. (Respondent) (*Granted*)

3446-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Delmar Contracting Limited; Cormar Contracting Limited; 971873 Ontario Limited (Respondent) (*Granted*)

3447-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Kel-Gor Ltd. (Respondent) (*Withdrawn*)

3449-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Guay Inc. (Respondent) (*Withdrawn*)

3450-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. Unique Construction (Respondent) (*Granted*)

3453-93-G: Christian Labour Association of Canada, Local 6 (Applicant) v. Regional Ready Mixed Concrete Company (Respondent) (*Withdrawn*)

3487-93-G: Operative Plasterers and Cement Masons International Association of the United States and Canada Local 598 (Applicant) v. Metro Concrete Floor (1990) Inc. (Respondent) (*Withdrawn*)

3503-93-G: Sheet Metal Workers' International Association, Local Union No. 30 (Applicant) v. Don Truax Sheet Metal Ltd., Truax Sheet Metal (Respondent) (*Granted*)

3518-93-G: Teamsters Local Union No. 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Active Excavating and Contracting Ltd./A. & T. Haulage Limited (Respondent) (*Granted*)

3573-93-G: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. David's Grovedale Construction Ltd. (Respondent) (*Withdrawn*)

MINISTER'S REFERENCE (SEC. 3(2)) HLDAA

3068-93-M: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Carecor Security Services Inc. Toronto East General Hospital (Respondent) (*Terminated*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1634-90-G: Labourers' International Union of North America - Local 1059 (Applicant) v. M. Concrete Forming (Respondent) (*Granted*)

2010-90-R: The Labourers' International Union of North America, Local 1059 (Applicant) v. 643210 Ontario Inc., operated by M. Concrete Forming and M. Concrete Forming Limited (Respondents) (*Granted*)

3306-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Cara Operations Limited (Respondent) (*Dismissed*)

3307-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. 764627 Ontario Limited c.o.b. as Swiss Chalet Restaurant (Respondent) (*Dismissed*)

3308-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. D. Isabella Investments Inc. (Respondent) (*Dismissed*)

3309-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Cara Operations Limited (Respondent) (*Dismissed*)

3311-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. 601210 Ontario Inc. (Respondent) (*Dismissed*)

3312-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Perry Hoo Foods Limited (Respondent) (*Dismissed*)

3313-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. J. Cabral Foods Limited (Respondent) (*Dismissed*)

3314-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Noel Cao Investments Inc. (Respondent) (*Dismissed*)

3315-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Vetrone Foods Limited (Respondent) (*Dismissed*)

3316-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Cara Operations Limited (Respondent) (*Dismissed*)

3317-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Tony Barradas Foods Limited (Respondent) (*Dismissed*)

3318-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Barry Kong Foods Inc. (Respondent) (*Dismissed*)

3320-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Famz Foods Limited c.o.b. as Swiss Chalet Restaurant (Respondent) (*Dismissed*)

3321-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. DeMelo Foods Limited (Respondent) (*Dismissed*)

3322-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Cara Operations Limited (Respondent) (*Dismissed*)

3324-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Cara Operations Limited (Respondent) (*Dismissed*)

3326-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. J. F. Sousa Investments Inc. (Respondent) (*Dismissed*)

3327-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. 412873 Ontario Limited (Respondent) (*Dismissed*)

3328-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. 580201 Ontario Limited (Respondent) (*Dismissed*)

3329-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Ko Hag Foods Limited (Respondent) (*Dismissed*)

3330-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. C. M. L. Foods Limited (Respondent) (*Dismissed*)

3331-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Famz Foods Limited (Respondent) (*Dismissed*)

3332-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Cara Operations Limited (Respondent) (*Dismissed*)

3333-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Albert Melo Foods Limited (Respondent) (*Dismissed*)

3334-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Ilda Foods Limited (Respondent) (*Dismissed*)

3336-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Danny Mo Foods Inc. (Respondent) (*Dismissed*)

3338-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Frank Lopes Foods Limited (Respondent) (*Dismissed*)

3340-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Viriato Foods Inc. (Respondent) (*Dismissed*)

3341-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Reistaurants Inc. (Respondent) (*Dismissed*)

3343-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. C. Calisto Foods Inc. (Respondent) (*Dismissed*)

3344-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Rahims Food Ltd. (Respondent) (*Dismissed*)

3345-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Valdo Mello Foods Limited (Respondent) (*Dismissed*)

3346-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. L. DeSousa Enterprises Limited (Respondent) (*Dismissed*)

3829-91-G: International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and its Local 230 (Applicant) v. Custom Concrete Northern Ltd. (Respondent) (*Dismissed*)

3913-91-U: Michael A. Rankin (Applicant) v. Local 721 of the Bridge, Structural and Ornamental Ironworkers of America (Respondent) (*Dismissed*)

0166-92-U: Eric Williams (Applicant) v. Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Respondent) v. Ellis Don Limited (Intervener) (*Dismissed*)

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March 1994



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A Monthly Series of Decisions from the
Ontario Labour Relations Board

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THE GREAT ATLANTIC & PACIFIC COMPANY OF CANADA LIMITED; RE UFCW, LOCALS 175 AND 633, BRIAN DONAGHY, DARRIN FAY, FRANK FORTUNATO, RICK FOX, HELMUT HALLA, ROBERT LIOTTI, DONALD LUPTON, GENE MARTIN, PAM MURDOK, PATRICIA O'DOHERTY, KATHY PAPACONSTANTINO, IRENE PARK AND CLIFF SKINNER

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THE GREAT ATLANTIC & PACIFIC COMPANY OF CANADA LIMITED; RE UFCW, LOCALS 175 AND 633, BRIAN DONAGHY, DARRIN FAY, FRANK FORTUNATO, RICK FOX, HELMUT HALLA, ROBERT LIOTTI, DONALD LUPTON, GENE MARTIN, PAM MURDOK, PATRICIA O'DOHERTY, KATHY PAPACONSTANTINO, IRENE PARK AND CLIFF SKINNER

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CANADA STAMPING AND DIES LIMITED; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 636.....

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Timeliness - Certification - Pre-Hearing Vote - Certification application made by raiding union timely when filed - Incumbent union submitting that notice given by it under section 35 of the *Social Contract Act* having effect of closing open period retroactively - Board finding no basis for interpretation offered by incumbent union - Board directing that ballots cast in representation vote be counted

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Unfair Labour Practice - Certification - Charges - Intimidation and Coercion - Fraud - Membership Evidence - Reconsideration - Following union's certification, certain employees making unfair labour practice application complaining about manner in which fellow employee collected membership evidence - Employer also seeking reconsideration of certification decision - Board hearing evidence of nine persons and resolving conflicting evidence in favour of union's witness - Board finding that employee collector did not contravene *Act* when he approached employees to obtain membership evidence - Employee collector's actions not causing Board to conclude that filed membership evidence unreliable - Applications dismissed

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WILLIAM NEILSON LTD.; RE MILK AND BREAD DRIVERS, DAIRY EMPLOYEES CATERERS AND ALLIED EMPLOYEES, LOCAL UNION NO. 647 326

Unfair Labour Practice - Picketing - Strike - Strike Replacement Workers - Right of Access - Board finding that company violated section 73.1 of the *Act* by using managers from non-struck stores to perform bargaining unit work at struck locations - Board making declaration and issuing cease and desist order - Employer seeking order restricting picketing at struck locations - Board analyzing provisions of section 11.1 of the *Act* and discussing Board's dual role in protecting statutory right to picket and in limiting exercise of that right in particular circumstances - Board finding evidence insufficient to persuade it that restrictions on picketing appropriate to prevent undue disruption of employer's operations - Application under section 11.1 of the *Act* dismissed

THE GREAT ATLANTIC & PACIFIC COMPANY OF CANADA LIMITED; RE UFCW, LOCALS 175 AND 633, BRIAN DONAGHY, DARRIN FAY, FRANK FORTUNATO, RICK FOX, HELMUT HALLA, ROBERT LIOTTI, DONALD LUPTON, GENE MARTIN, PAM MURDOK, PATRICIA O'DOHERTY, KATHY PAPACONSTANTINO, IRENE PARK AND CLIFF SKINNER 303

Unfair Labour Practice - Strike - Strike Replacement Workers - Employer submitting that preconditions for application of section 73.1 of the *Act* not met because of various aspects surrounding strike vote, including length of time between vote and calling the strike, wording of ballot and other matters - Board deciding that preconditions satisfied - Board ruling that manager who had been promoted from bargaining unit after giving of notice to bargain precluded from doing struck work - Board finding that driving not work ordinarily performed by anyone and that performance of such work during the strike not violating the *Act* - Board ruling that use of non-bargaining unit "occasional" workers to do struck work violating the *Act* - Employer directed to cease and desist from using replacement workers in breach of section 73.1 of the *Act*

CANADA STAMPING AND DIES LIMITED; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW-CANADA) AND ITS LOCAL 636.....

2873-92-G International Union of Operating Engineers, Local 793, Applicant v. Associated Contracting Inc., Responding Party

Abandonment - Construction Industry - Construction Industry Grievance - Employer alleging abandonment of bargaining rights in context of union's grievance referral - Board denying union's preliminary objections to effect that issue of abandonment *res judicata* and that employer could not establish *prima facie* case

BEFORE: D. L. Gee, Vice-Chair, and Board Members F. B. Reaume and G. McMenemy.

APPEARANCES: S.B.D. Wahl and M. Gallagher for the applicant; W. Thornton and T. Capobianco for the responding party.

DECISION OF THE BOARD; March 3, 1994

1. This is a referral of a grievance to the Board pursuant to section 126 of the *Labour Relations Act* (the "Act"). The grievance alleges a number of violations of a collective agreement between the responding party (also referred to in this decision as the "Employer") and the applicant (also referred to in this decision as the "Union" or "Local 793").
2. The grievance was referred to the Board on December 23, 1992. At that time the applicant waived the time limits imposed under section 126 of the Act and requested that the grievance be scheduled to be heard in conjunction with Board Files 2282-92-R and 2283-92-R. Files 2282-92-R and 2283-92-R are applications for certification in which a Labour Relations Officer is conducting examinations. Those examinations have yet to be completed.
3. In September of 1993, the Employer filed an application under section 137 of the Act (Board File No. 1700-93-U) and a related request for interim relief under section 92.1 (Board File No. 1701-93-M) in which the Employer asserted, among other things, that officials of Local 793 threatened to encourage an unlawful strike and or picket at sites of the Employer pursuant to an invalid "No Board Report". Amongst the relief sought by the Employer was a declaration that Local 793 had abandoned its bargaining rights/collective agreement with the Employer.
4. Hearings into these two applications commenced on September 3, 1993. The Board's decision is reported: *Associated Contracting Inc.*, [1993] OLRB Rep. Nov. 1117.
5. By letter to the Board dated December 15, 1993 counsel for the Employer requested that the instant application be scheduled for hearing "in order to place the issue of abandonment before the Board." By letter to the Board dated December 22, 1993 counsel for the Union raised a preliminary issue as to whether the Employer should be permitted to lead evidence in support of its allegation that Local 793 had abandoned its bargaining rights in relation to the Employer. At the suggestion of both counsel, the Board scheduled one day of hearing, followed by three later days of hearing.
6. On February 17, 1994 the Board heard argument with respect to the preliminary issue.
7. Counsel for Local 793 argued that the Employer should not be permitted to lead evidence going to the issue of abandonment as the issue had already been determined by the Board in the section 137 application. Counsel asserted that the principles of *res judicata* and issue estoppel apply. In our view, the Board's written reasons in Board File No. 1700-93-U indicate that the issue of abandonment was not dealt with in that proceeding. At paragraph 16 of the decision the Board

stated that “the Board was *not inclined to inquire into* [our emphasis] the continued existence of bargaining rights in this case.” Accordingly, this issue has not yet been dealt with by the Board.

8. Counsel for the applicant further argued that the Employer could not establish a *prima facie* case of abandonment as abandonment cannot occur during the initial term of a collective agreement. In support of this argument counsel relied on the decision of *Pasinato Haulage Inc.*, [1981] OLRB Rep. April 486 in which the Board stated, at paragraph 6:

The Board is of the view that no allegation of “abandonment” can be raised during the initial term of an otherwise applicable collective agreement, and the applicant has been able to cite no previous case in which the Board has indicated the appropriateness of such an inquiry.

9. In our view, the passage relied upon by the applicant stands for the proposition that, as a practical matter, it would be very difficult (if not impossible) to establish an abandonment of bargaining rights within the initial term of a collective agreement, absent extraordinary circumstances. The determination as to whether abandonment has occurred is, as has been stated by the Board on numerous occasions (see: *R. Reusse Co. Ltd.*, [1988] OLRB Rep. May 523 and cases referred to herein at paragraph 13), a matter of fact to be resolved by the Board in the circumstances of each case. As indicated by the Board in *Marineland of Canada Inc.*, [1990] OLRB Rep. Dec. 1298, the possibility does exist that circumstances may arise during the initial term of a collective agreement which may lead the Board to conclude that an abandonment of bargaining rights has occurred. In this regard, the Board stated at paragraph 18 as follows:

There is no minimum dormant period that must pass before abandonment can be found to have occurred. For example, if weeks after a certificate issued a union unequivocally stated it had abandoned its bargaining rights, the Board might well conclude that bargaining rights had been abandoned at that time.

10. Likewise, if a union unequivocally stated, during the initial term of a collective agreement, that it had abandoned its bargaining rights the Board might conclude that bargaining rights had been abandoned. The fact that such occurred “during the initial term of a collective agreement” would not, *ipso facto*, mean that an abandonment could not be found. This argument too must fail therefore.

11. For the reasons set out above, the applicant’s preliminary objections are hereby denied.

12. The hearing of this grievance will proceed as scheduled on March 9, 10, 11, 1994. The parties are to be prepared to adduce all evidence upon which they intend to rely with respect to the issue of whether there has been an abandonment of bargaining rights and argue the merits of the abandonment issue.

0927-93-G International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128, Applicant v. Babcock & Wilcox, International Division, Responding Party

Construction Industry - Construction Industry Grievance - Board determining that certain water lancing work performed on steam generators located within Hydro nuclear power facility not falling within terms of collective agreement between EPSCA and Boilermakers' union

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *R. M. Sloan* and *B. L. Armstrong*.

APPEARANCES: *David McKee, Hugh Laird* and *Michael Church* for the applicant; *Bruce Binning* and *Murray Sanderson* for the responding party.

DECISION OF THE BOARD; March 10, 1994

1. The applicant, pursuant to section 126 of the *Labour Relations Act*, has referred a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination.
2. The grievance in question relates to water lancing work (which will shortly be described in greater detail) performed by the responding party (also referred to as "B&W" or the "company") on steam generators located within Unit 6 of the Pickering nuclear power facility operated by Ontario Hydro (also referred to as "Hydro"). The applicant (also referred to as the "union") asserts that the work in question falls within the scope of the collective agreement (also referred to as the "EPSCA agreement") between the Electrical Power Systems Construction Association and the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers. It was not disputed that B&W is bound to the EPSCA agreement; the company argues, however, that the work in question does not fall within the scope of that agreement. The union argues, in the alternative, that the work in question falls under the terms of the collective agreement (also referred to as the "BCA agreement") between the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers and the Boilermaker Contractors' Association. Despite the alternative position advanced by the union, the parties agreed that, at least at this stage of the proceedings, the Board should consider only whether the work in question falls under the EPSCA agreement; the parties' evidence and submissions were directed to that issue and it is that issue which is the subject of the present decision.
3. During the hearing in this matter numerous documents were filed as exhibits. In addition the Board heard the oral evidence of seven witnesses including not only representatives of the company and the union but also two Hydro officials the union called to testify. In coming to its findings of fact the Board has carefully considered all of the evidence before it and taken into account such factors as: the demeanour of the witnesses when giving their evidence, the clarity and consistency of that evidence when tested in cross-examination, the witnesses' ability to recall events and resist the tug of self-interest in shaping their answers, and what seems most probable in all the circumstances. Having said that, however, it is also appropriate to observe that, upon reviewing the evidence, it does not appear to us that there are material or significant conflicts in the evidence of the various witnesses who testified. The parties continued, however, to disagree about the appropriate characterization and consequent legal conclusions which ought to flow from that evidence.
4. The work in question was performed by B&W in or about March and April of 1993 dur-

ing a planned shutdown of unit 6 of Hydro's Pickering facility. The main purpose of the shutdown, which lasted approximately 110 days, included boiler maintenance, chemical cleaning, water lancing and other work. It is, of course, only the water lancing work which is the subject of the instant grievance. Case Bassie, a contract administrator for Hydro's technical procurement and services, estimated that the water lancing would take 2 to 3 24 hour days of work for each of the 4 sets of 3 to 4 boilers involved.

5. Each of the boilers or steam generators is a large vertical heat exchanger. Within each generator is a series of thousands of tubes which carry reactor coolant. The tubes are each approximately 1/8 inch in diameter and are spaced approximately 1/8 inch apart. Outside the tubes but within the boiler, feed water flows to cool the reactor. Steam is produced during this process. As the boiler feed water circulates through the piping it picks up various metallic contaminants and trace impurities. As the feed water is converted to steam some of the various impurities remain as solids and precipitate to the bottom of the boiler in an area referred to as the tube sheet. This results in a sludge pile which tends to collect in the center of the tube bundle on the tubesheet. This sludge is as hard as concrete and packed as it is in the midst of a densely packed tube bundle is difficult to remove. The waterlancer is a device which can pump water at pressures up to 10,000 pounds per square inch. The generator is a solid unit which cannot be dismantled. Consequently, special access holes are cut to facilitate access by the water lance. The lance itself is approximately 1/8 inch wide, 1-1/2 inches high and 8-9 feet long. It is made of a flexible material which allows it to bend through the various radii and angles within the tube lanes. The water lance directs the high pressure water back and forth across the sludge pile. In this fashion the sludge pile is broken up and washes away through a suction hose which is placed in the boiler to facilitate the process.

6. This was not the first time that B&W has performed water lancing work for Hydro. Although the circumstances leading to Hydro's decision to do the work may have varied, it would appear that similar work has been performed by B&W for Hydro on three previous occasions: in 1989 on Unit 2 at the Bruce Generating Station at Douglas Point; in 1990 on Unit 1 at the same facility; and in 1992 on Unit 5 at the Pickering facility. The water lancing work done on Unit 5 appears to have been virtually identical to that currently under consideration. The work on Unit 5, however, was performed during a forced outage which resulted from severe leaks within the boilers. Mr. Bassie conceded that Unit 5 was damaged although he referred to the work done there as required maintenance. He contrasted that to the work on Unit 6 (which was neither damaged nor the subject of a forced outage) which he characterized as preventative maintenance. Regular performance of water lancing (and related operations) will contribute to the prevention and control of the kind of extensive pitting and corrosion which may damage the boilers and reduce their efficiency. Up to 10% of the tubes within any boiler may be plugged before there is any impact on boiler efficiency. There had been no loss of efficiency within Unit 6 at the time the water lancing work was done. Mr. Pink, B&W's manager of nuclear services, also described the work done at Unit 6 as maintenance which does not affect the capacity of the unit but rather improves or maintains the longevity of the boilers, insuring that they will reach their design life expectancy.

7. On each of the previous occasions that the company performed water lancing work, the union and B&W reached an agreement whereby the latter would remit to the union monthly dues of \$30.00 for each B&W employee performing water lancing work at the relevant Hydro site. It was conceded by the union that the \$30.00 figure does not correspond to any relevant construction or shop collective agreement to which the union is a party. Apart from the dues payment just described, the work in question was performed entirely free from the strictures of any collective agreement whether in respect of hiring or otherwise. Towards the end of 1992 and the beginning of 1993 the union advised the company that it was unwilling to continue this arrangement in relation to future water lancing work. This change in position on the part of the union coincided with Ed

Power's assumption of the position of business manager. By letter dated January 15, 1993 addressed to Dave Butt, B&W's manager of industrial relations and safety, Mr. Power articulated the union's position as follows:

Please be advised that after seeing the labour requirements clause for upcoming Boiler lancing work at Ontario Hydro and seeking legal council [sic], that you should make your submissions for this work based on the construction field rates.

I realize in the past this Local has permitted workers to do this type of work, but, that was under a different Business Manager.

I believe that all of this work from this date forward should be done at construction rates....

8. While the union's position was that water lancing work should be considered construction work, the company responded that it was prepared to negotiate what it referred to as a "suitable service type agreement" to apply to its employees performing water lancing work. In any event, the discussions between the parties were neither prolonged nor fruitful and B&W proceeded to do the work in question without reference to the terms of any collective agreement including the EPSCA agreement and the union initiated the current proceedings.

9. Both parties, for different reasons, pointed to the previous arrangement governing water lancing work as relevant to our determination in this matter. The company emphasized the significance of the fact that it had previously, and without any grievances being filed, performed water lancing without applying the terms of any collective agreement with the union. The union undermined that assertion by questioning whether the company's previous remittance of union dues in respect of that work could legitimately be seen as *ex gratia* and pointed, at least in its questioning of one B&W witness, to various possible explanations for the company's conduct including the value to it of being able to tell other trades and Hydro employees on site that dues were being paid to the union in respect of B&W employees. While there may well be some compelling, though conflicting, logic to the assertions of both parties in respect of the previous water lancing work, the Board is ultimately unable to see how that evidence is of assistance to us in dealing with the issue which currently concerns us, namely whether the work in question falls within the scope of the EPSCA agreement. We find any attempt to distil motives and infer the appropriate interpretation of the collective agreement from the prior arrangement to be remarkably similar to performing the same functions in relation to the settlement of a prior related grievance. Consequently, even assuming consideration of the prior manner in which the parties dealt with water lancing work pointed unambiguously to one result or another in the present case (something which we seriously doubt), the Board is reluctant to ascribe too much significance to that consideration. To effectively hold the parties to the terms of what no one suggested was anything other than an ad hoc arrangement would be akin to arbitrarily and unproductively stripping a grievance settlement of its without prejudice character. The Board is reluctant to do anything which will serve as a disincentive for the parties to bargain their ways out of difficult labour relations problems. Such agreements are fundamental to the continuing health of labour relations and as such are a prominent feature of the labour relations landscape and perhaps particularly so in the construction industry.

10. In a similar vein, there is other evidence, primarily pointed to by the union, which we find to be ultimately equally unhelpful to our determination. In a memo dated March 11, 1993 from Hydro to B&W, Mr. Bassie communicated the following:

... As the precedent has already been set on Unit 5 Boiler Lancing and your bid was submitted on the same basis, the work to be done by Babcock and Wilcox under this contract for Unit 6 Boiler Lancing shall be under the terms of our Form B Labour Requirements Clause...

11. Hydro's Form B Labour Requirements Clause as opposed to its Form 1 Labour Requirements Clause applies to work other than that covered by the EPSCA agreement.

12. A week later Mr. Bassie transmitted a further up memo to B&W as follows:

Further to my Fax dated March 11, 1991 [sic], I am advised by our Labour Relations that precedence was not set in labour assignment on the Pickering Unit 5 Steam Generator lancing contract. However, after some discussions between Ontario Hydro Labour Relations, Construction and the Boiler Maker's Union it was agreed to allow B&W to complete the work as contracted. i.e. it was not determined that the work was not Construction Industry Work and decisions made regarding Unit 5 would not automatically apply to Unit 6 or other subsequent units.

Therefore I must retract my statement re the Form B, and advise you that any of the B&W scope of work under the contract must be performed under our Form 1 Labour Requirements Clause, *should the work be determined to be Construction Industry work*. Ontario Hydro shall not be responsible for any additional costs in this event. B&W will also be responsible for determining whether or not the work is Construction Industry work.

[emphasis added]

13. Consideration of these memos along with Mr. Bassie's *viva voce* evidence does not persuade us that any determination was made by Hydro that the work in question was construction work or otherwise fell under the terms of the EPSCA agreement. All that Hydro appears to be saying is that the prior arrangement regarding water lancing work is not dispositive, a conclusion consistent with the view the Board has just expressed. Thus, even assuming its view of the nature of the water lancing work might be of assistance to us, Hydro appears to be saying little more than the work is subject to the terms of the EPSCA agreement if it is construction work.

14. This, of course, brings us squarely to the very issue to be decided by the Board in this case: is the water lancing work performed by the company construction industry work or, put perhaps more accurately, does it fall within the scope of the EPSCA agreement?

15. The employer refers us to a number of Board decisions including *Belmont Property Management Ltd.*, [1991] OLRB Rep. Oct. 1117; *Lever & Associates Contracting Inc.*, [1989] OLRB Rep. June 630; and *Gallant Painting*, [1987] OLRB Rep. Mar. 367 each of which deals, in the context of a certification application, with the often vexing distinction between "construction" and "maintenance" work. Each of these cases rely on the seminal case of *The Master Insulators' Association of Ontario Inc.*, [1980] OLRB Rep. Oct. 1477 in which the Board at paragraphs 28 and 29 dealt with the distinction as follows:

• • •

28. With the exception of the work performed at the premises of Fearman and the work on a new emergency shower and minor work in a change house at Stelco, the work performed by the employers who were named in this complaint was essentially similar in nature. In our view, the work at the premises of Fearman, which involved an addition to an existing facility and involved both relocation of producing units and the expansion of existing capacity, was clearly new construction. Similarly, the work on the emergency shower and change house at Stelco was an addition for the safety and comfort of Stelco's employees and represented new construction. This work is clearly within the industrial, commercial and institutional sector of the construction industry. The rest of the work referred to in the complaint was, for the most part, clearly work which sustained and maintained an operating facility and enabled that facility either to operate efficiently or to attain its designed or production capacity and it [ought] to be regarded as maintenance work. Maintenance work is to be distinguished from construction work which involves the addition to an existing facility or which will increase the designed or production capacity of an existing facility. However, in so far as there was work of new construction, which was purportedly done under the maintenance agreement, it was a violation of section 134(a) of the Act.

29. Maintenance work performed by the employers who were named in this complaint is in reality part and parcel of the production and maintenance operations of the industrial clients for whom the work is performed. These industrial clients may, and frequently do, perform their own maintenance work with their own employees who are included in their own industrial bargaining units. In the context of the work affected by this complaint "maintenance" is difficult to distinguish from "repair". In our view, it is a question of the context of any given work and the degree of addition or subtraction of such work to an existing system or part of a system. Where the work assists in preserving the functioning of a system or part of a system, such work is maintenance work. Where the work is necessary to restore a system or part of a system which has ceased to function or function economically, such work is repair work. "Maintenance" and "repair" are not mutually exclusive concepts, and lack of adequate maintenance will surely produce a situation where repair becomes inevitable. In our view, the performance of adequate and timely maintenance forestalls or reduces the requirement for repair.

16. We note as well that the Board observed in that case that the word repair (which is included in the statutory definition of construction found in section 1(1) of the Act) as it was used in the maintenance agreement there under consideration was not to be construed as "repair" as contemplated in the statutory definition.

17. The union does not challenge the authorities relied upon by the company. Indeed, the union candidly concedes that the water lancing work in question may well not be construction industry work if one is limited to the statutory definition and its interpretation in the cases just cited. That, however, asserts the union, is not the issue before the Board. In *The Electrical Power Systems Construction Association*, [1990] OLRB Rep. Oct. 1031 the Board concluded that the work performed by an employee assigned to light duties in Hydro's pallet yard was (whether or not it was construction as defined in the Act) work covered by the relevant collective agreement. The Board framed the issue in that case as follows (at paragraph 34):

... The issue before us is *not* whether the work performed by Mr. Richards is work in the "construction industry" as that term is defined in the Act. Rather, the issue is whether the work which Mr. Richards was performing fell within the parameters of the collective agreement.

[emphasis in original]

18. We adopt the reasoning in arriving at that formulation of the question and are satisfied that, with the appropriate changes, this is the very issue we must decide in the present case: does the water lancing work fall within the terms of the EPSCA collective agreement?

19. The union points us to Article 1.1 of the collective agreement which provides as follows:

EPSCA recognizes the Union as the exclusive bargaining agency for ... [boilermakers] engaged in all construction industry work* performed in the Province of Ontario on Ontario Hydro property for the bulk power system...

* ... The work encompasses:

- construction of new facilities
- additions to existing facilities
- major - modifications
 - rehabilitation
 - reconstruction of
 - existing facilities

20. While the union may well be correct in its assertion that the scope of work covered by the EPSCA agreement is broader than the parameters of construction industry work as defined in

the Act, we are not persuaded that the provisions of the EPSCA agreement are wide enough to capture the water lancing work performed at Unit 6. We are not convinced that this work is properly characterized as the kind of "major modification rehabilitation" contemplated by the agreement. Indeed, unlike tube plugging work which involves a physical modification to the boiler systems and which has apparently been performed previously under the terms of the EPSCA or BCA agreements, we are not satisfied that the current work is properly characterized as "modification". Similar observations apply to the support work done by Hydro - work which was not part of B&W's contract but was done by Hydro under the terms of the EPSCA agreement - to facilitate the water lancing work, namely the cutting of holes in the boilers to facilitate access for the lance and its manipulator. And, finally, while it may be that we would be driven to a different conclusion were we examining the water lancing work performed previously at Unit 5 and the circumstances necessitating that work, we draw no conclusions about the nature of that work since it is not the subject of our deliberations.

21. We accept the evidence of both Mr. Bassie and Mr. Pink regarding the appropriate characterization of the work in question. The work was, in essence, preventive maintenance designed to maintain the proper and efficient functioning of the boilers and to prevent the need for future repairs which might well be necessary in the absence of such maintenance. It is not work which falls within the scope of the EPSCA collective agreement and to the extent it alleges a violation of that agreement, this application is dismissed.

22. In view of the parties' agreement about the limited nature of the Board's inquiry at this stage of the proceedings, the applicant is directed, within 30 days of the date hereof, to advise the Registrar whether there are any remaining issues in dispute between the parties requiring further hearing. In the absence of any such notification this application will be deemed to have been dismissed in its entirety.

2734-93-G Labourers' International Union of North America, Local 183, Applicant v. Bairrada Masonry Inc., Responding Party

Construction Industry - Construction Industry Grievance - Damages - Reconsideration - Remedies - Board earlier refusing to enforce 120 per cent interest rate set out in collective agreement - Union's reconsideration application dismissed

BEFORE: *Janice Johnston*, Vice-Chair, and Board Members *D. A. MacDonald* and *H. Kobryn*.

DECISION OF THE BOARD; March 21, 1994

1. On February 10, 1994 the applicant filed with the Board a request for reconsideration of the Board's decision dated December 23, 1993.

2. In the request for reconsideration the applicant seeks the following relief:

An Order varying the decision dated December 23, 1993 to the effect that interest calculated in accordance with the Agreement in the amount of \$1,604.19 is due and owing to the Applicant.

3. Pursuant to section 108(1) of the Act the Board has a broad discretion to reconsider its decisions. Section 108(1) reads as follows:

108.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

4. Sections 83, 85 and 125 of the Board's Rules of Procedure provide that:

83. A request for reconsideration under subsection 108(1) of the Act must include complete written representations in support of the request.

85. No request for reconsideration will be considered where it is filed thirty (30) or more days after the date of the Board's decision, except with the permission of the Board.

125. These Rules apply to all cases before the Board on the date these Rules come into force, unless the Board orders otherwise.

5. With regard to requests for reconsideration, the Board stated in *K-Mart Canada Limited (Peterborough)*, [1981] O.L.R.B. Rep. Feb. 185 at ¶4:

"To avoid abuse of the reconsideration provision and bring some finality to its adjudicated decisions the Board has adopted principles not unlike those of the courts. The Board will not normally accede to a request to reconsider unless the party requesting reconsideration intends to adduce new evidence which was not previously available to them by the exercise of due diligence, and then only where such additional evidence, if proved, would be likely to make a substantial difference to the outcome of the cases. Reconsideration is therefore generally restricted to allowing a party to adduce evidence or make representations which it did not have a previous opportunity to raise. The Board may also consider such factors as the motives for the request for reconsideration in light of a party's conduct, and the resulting prejudice to another party if the case is reopened. (See, generally, *International Nickel Company of Canada*, 63 CLLC 16,284; *The Detroit River Construction Limited*, 63 CLLC ¶16,260; *National Steel Car Corporation Limited*, [1966] OLRB Rep. Apr. 55; *Canadian Union of General Employees*, [1975] OLRB Rep. Apr. 320; *York University*, [1976] OLRB Rep. Apr. 187 affirmed, sub. nom. *Jordan v. Ontario Labour Relations Board, York University Faculty Association, York University*, 78 CLLC ¶14,132, (Ont. Div. Ct.)."

The Board also provided as follows in *John Entwistle Construction Limited*, [1979] OLRB Rep. Nov. 1096 at ¶5:

"The Board exercises its jurisdiction under section 95(1) [as it then was] of the Act to reconsider and vary or revoke any decision with care and caution in order not to undermine the finality of its decisions and, as stated by the Board in *Canadian Union of General Employees*, [1975] OLRB Rep. April 320:

"Generally, the Board will not reconsider a decision unless a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence and the new evidence which is such that, if adduced, it would be practically conclusive or a party wishes to make representations or objections not already considered by the Board that he had no opportunity to raise previously."

These are general standards which the Board had developed as guidelines and which are useful not just to guide the Board in making its decisions, but also to allow parties who may be affected by the Board's decisions some degree of certainty of what to expect from the Board. While it is important for the purpose of certainty that these standards generally be adhered to, it is equally important that they not be followed inflexibly. Although neither of the two conditions precedent stated in the *Canadian Union of General Employees* case, *supra*, are satisfied here, the request does raise sig-

nificant and important issues of Board policy and for this reason the Board will review its decision to determine if it should vary or revoke the decision."

6. Generally, therefore, the Board will not reconsider a decision unless either a party intends to introduce new evidence which could not previously have been obtained by reasonable diligence and such evidence if adduced would be practically conclusive, or the party intends to raise objections or make representations not already considered by the Board which the party did not have an opportunity to raise previously. These limits are placed around the exercise of the Board's discretion to reconsider as a recognition of the need for the Board to apply a principle of finality to its decisions so that in the normal course of proceedings a party can safely rely on a decision as establishing the rights between the parties. Without this level of finality the intended expediency of the Board would not be realised. The purpose of the Act and this Board to further harmonious labour relations would be seriously hampered without such level of finality.

7. The applicant's request for reconsideration does not indicate an intention to adduce new evidence, nor does the applicant seek to make representations which it did not have a previous opportunity to raise during the hearing of this matter which proceeded the decision of December 23, 1993. The Board raised its concerns with regard to the rates of interest in the collective agreement and provided the applicant with the opportunity to make any and all submissions it wished to on the point.

8. The applicant argues that the Board in refusing to enforce the interest rate of 120 per cent per annum in the collective agreement erred in law. The matter of interest rates is dealt with by the Criminal Code of Canada as follows:

347. (1) Notwithstanding any Act of Parliament, everyone who

(a) enters into an agreement or arrangement to receive interest at a criminal rate, or

(b) receives a payment or partial payment of interest at a criminal rate, is guilty of

(c) an indictable offence and liable to imprisonment for a term not exceeding five years, or

(d) an offence punishable on summary conviction and is liable to a fine not exceeding twenty-five thousand dollars or to imprisonment for a term not exceeding six months or to both.

...

"criminal rate" means an effective *annual rate of interest* calculated in accordance with generally accepted actuarial practices and principles *that exceeds sixty per cent* on the credit advanced under an agreement or arrangement;

...

"interest" means the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes.

...

[emphasis added]

Therefore, the interest rate which the applicant seeks to enforce is defined as a criminal rate of interest pursuant to section 347 of the Criminal Code. The Board, in refusing to enforce such an unconscionable and probably illegal interest rate was motivated by what could only be considered sound reasons of public policy. The parties to the collective agreement in this case have negotiated an interest rate which appears to be contrary to the Criminal Code. The Board can and should decline to enforce any clause in a collective agreement which in all likelihood is illegal.

9. When the Board hears an application pursuant to section 126 of the Act, it is acting as a Board of Arbitration. Section 126(3) provides:

126.-(3) Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and subsections 45 (6.3), (8), (8.1), (8.3) and (9) to (12) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

Section 45(8) of the *Labour Relations Act* dealing with the jurisdiction and powers of an arbitrator states as follows:

45.- (8) An arbitrator or arbitration board shall make a final and conclusive settlement of the differences between the parties and, for that purpose, has the following powers:

• • •

3. To interpret and apply the requirements of human rights and other employment-related statutes, despite any conflict between those requirements and the terms of the collective agreement.

Thus the Board has the jurisdiction to interpret and apply the requirements of employment related statutes and if there is a conflict between the statute and the collective agreement, to decline to enforce the collective agreement. While not directly applicable to the case before us, the principle encapsulated in section 45(8)3 nevertheless provides some guidance.

10. In addition, the jurisprudence is clear that the Board while hearing an application pursuant to section 126 of the Act also continues to sit as a statutorily empowered tribunal with all of the discretion and authority provided to it by its enabling legislation (see *Re International Association of Heat & Frost Insulators & Asbestos Workers Local 95 and Master Insulators Association of Ontario et al.*, 99 D.L.R. (3d) 757). Labour relations policy considerations in the construction industry do not support the Board enforcing an interest rate such as is found in the case before us.

11. For the foregoing reasons this request for reconsideration is hereby denied.

3470-93-R United Steelworkers of America, Applicant v. CAA Northeastern Ontario Auto Club and Ontario Motor League Worldwide Travel (Sudbury) Inc., Responding Party

Bargaining Unit - Certification - Employee - Employee Reference - Practice and Procedure - Union applying for certification and both union and employer participating in waiver process - Union making no challenges to list of employees filed by employer and Officer subsequently announcing the count - Employee list not including four Regional Managers - Union and employer subsequently agreeing on bargaining unit description, but union advising Board that parties disputing whether Regional Managers should be included in bargaining unit - Union asking Board to appoint officer under section 108(2) of the *Act* - Employer objecting to request under section 108(2) as untimely, prejudicial and an abuse of waiver and certification procedure - Board holding that union and employer bound by agreements made in waiver process, including agreements on list of employees in bargaining unit and on geographic scope of bargaining unit - Certificate issuing - Request under section 108(2) not considered by panel in context of certification application

BEFORE: *M. Kaye Joachim*, Vice-Chair, and Board Members *G. O. Shamanski* and *B. L. Armstrong*.

DECISION OF THE BOARD; March 3, 1994

1. The style of cause is hereby amended to reflect the correct name of the responding party: "CAA Northeastern Ontario Auto Club and Ontario Motor League Worldwide Travel (Sudbury) Inc."

2. This application for certification was filed on January 12, 1994. The applicant sought certification for the following bargaining unit:

all employees of the responding party in the Province of Ontario save and except Managers and those above the rank of manager.

3. The responding party proposed the following bargaining unit:

all employees of the Respondent in Sudbury, Espanola, North Bay, Parry Sound and Timmins save and except managers, persons above the rank of Manager, Executive Secretary and Administrator: Accounting and Compensation.

4. On January 31, 1994, a Labour Relations Officer contacted the parties to attempt to obtain agreement on all outstanding issues and thereby waive the necessity for a hearing in this matter. The applicant was provided with the respondent's list of employees. There were a total of thirty-one names on the list. The responding party employed four Regional Managers on the application date, none of whom were included on the list.

5. During the waiver process, the parties were able to partially agree on the bargaining unit description as follows:

all employees of CAA Northeastern Ontario Auto Club and Ontario Motor League Worldwide Travel (Sudbury) Inc. save and except Managers, persons above the rank of Manager, Executive Secretary to the President and Administrator: Accounting and Compensation and pending resolution by the Board the bargaining unit is restricted to the cities of Sudbury, North Bay and Timmins and the Towns of Espanola and Parry Sound.

6. The applicant's position was that the appropriate geographic scope of the bargaining

unit is the Province of Ontario while the responding party's position was that the geographic scope of the bargaining unit should be restricted to the cities of Sudbury, North Bay and Timmins and the Towns of Espanola and Parry Sound.

7. After reviewing the list, and its membership evidence, the applicant decided that it was in a certifiable position with or without any possible challenges to the list and therefore did not make any challenges to the list. As a result of the partially agreed upon bargaining unit, the names on the list, and the application of the thirty/thirty rule, the applicant lost six cards. The applicant did not challenge the lost cards. Specifically, the applicant did not challenge the fact that the names of the four Regional Managers were missing from the list.

8. The Officer announced the count. At that time the applicant had seventeen membership cards out of the agreed upon list of twenty-eight employees (sixty-one per cent). Therefore, the applicant was in a certifiable position, regardless of the outcome of the disputed geographic scope of the bargaining unit.

9. By letter dated February 3, 1994, the applicant advised the Board that the parties had resolved all outstanding issues with respect to the certification application and had agreed to the following bargaining unit description:

all employees of CAA Northeastern Ontario Auto Club and Ontario Motor League Worldwide Travel (Sudbury) Inc. in the Districts of Cochrane, Manitoulin, Nipissing, Parry Sound, Sudbury, Timiskaming and the Regional Municipality of Sudbury save and except Managers, persons above the rank of Manager, Executive Secretary to the President and Administrator: Accounting and Compensation.

10. In that same letter, the applicant advised that *following* the agreement reached on the bargaining unit description (the only outstanding issue in dispute) a dispute between the parties emerged as to whether the position currently called Regional Manager is included in the bargaining unit description. The applicant requested that the Board, pursuant to subsection 108(2) of the Act, appoint a Labour Relations Officer to conduct an examination into the duties and responsibilities of Regional Managers and issue a report.

11. By letter dated February 7, 1994, the responding party objected to the request under section 108(2) as being untimely, prejudicial to the respondent, and an abuse of the waiver and certification procedure. The responding party argues that the names of the four Regional Managers were excluded from the list reviewed by the applicant. The applicant did not challenge the list although they had lost six cards. The responding party asserts that it was incumbent upon the applicant to challenge the exclusion of Regional Managers during the waiver process. Having failed to do so, the responding party asserts that it is no longer open to the applicant to challenge the list either directly in this certification application or indirectly by way of a section 108(2) application. To do so would be an abuse of the Board's certification process. It would also be prejudicial to the respondent. The responding party notes that they had agreed to a geographic description wider than initially contained in its response to the certification and notes that they may not have done so had they known there were four managerial challenges outstanding. Further, the responding party notes that they had not been assured by the Officer that the addition of the four names to the list would not make a difference to the count. The applicant had seventeen cards out of twenty-eight names on the list. Adding four Regional Managers would make a list of thirty-two. (17 out of 32 = 53%). The applicant would then need at least one more card to be certifiable.

12. The responding party requests that the Board direct the applicant to adhere to its position, taken in the waiver process, that there were no managerial challenges to the list, that the bargaining unit consisted of twenty-eight persons on the application date and that the four Regional

Managers not included on the list are excluded from the bargaining unit. In the alternative, the responding party appears to be requesting a new count and a chance to reconsider its agreement on the geographic scope.

13. The applicant was asked to respond to the employer's letter dated February 7. The applicant asserts that the dispute over the Regional Managers arose for the following reasons. On January 10, the responding party circulated a memorandum advising that the title of Office Supervisor had been changed to Regional Manager. The applicant asserts that they learned about this change on January 13 (the day after the application for certification was filed). The applicant questioned why the title of the Office Supervisor had been changed to Regional Manager, what the responding party's position is on whether Office Supervisors/Regional Managers rank above or below Managers, and what the responding party's position is on whether Office Supervisors/Regional Manager perform managerial functions. They also question why Office Supervisors/Regional Managers were left off the list of employees submitted by the employer, if the employer wanted to exclude them, when the positions of Executive Secretary and Administrators: Accounting and Compensation were set out in the list but marked with asterisks indicating that the respondent wished to claim a section 1(b) exclusion.

14. The recent change of terminology from Office Supervisor to Regional Manager does not explain why the applicant failed to challenge the exclusion of the four Regional Managers from the list. The applicant does not assert that the recent change in job title caused them any confusion. Rather they assert that, having reviewed the list and the membership evidence, they decided that they were in a certifiable position in any event and therefore *chose* not to challenge the list. Therefore, the Board does not find the fact that the title of Office Supervisor was changed to Regional Manager about the time that the application was filed is a factor to be considered.

15. The applicant asserts that the list for purposes of the count has never been treated by the Board as an exhaustive and final list of members of the new bargaining unit. They cite the following policy reasons why they should not be bound to the agreed upon list:

- “(a) an applicant for certification may not be aware of the existence or non-existence of certain individuals and classifications in a work place and is not obliged to hunt down and identify each and every member of the proposed bargaining unit before it may be certified;
- (b) an applicant often avoids making challenges to the effect that certain named individuals are missing from the list because doing so suggests to the employer that the named individual signed cards. If the employer's argument is accepted, the malevolent employers could deliberately leave names and classifications off a list, knowing that the applicant will make challenges to include its supporters and in an effort to identify those supporters, contrary to section 113 of the Act; and
- (c) for this reason, an applicant is not obliged to make all possible challenges to the list for purposes of the count. If an applicant finds itself in a certifiable position notwithstanding possible challenges, it is entitled to agree to the list and proceed to the count.”

16. None of these policy reasons are applicable to the facts of this case. The applicant does not assert nor do the facts of this case suggest that any of the reasons in subparagraphs (a) to (c) above were the reasons that the applicant failed to challenge the list.

17. The applicant argues that if they are not entitled to challenge the list by way of a section 108(2) application, “it is hard to imagine how any applications pursuant to subsection 108(2) could ever be heard by the Board without “prejudice” to an employer: there would be no need for an

inquiry by the Board into “questions as to whether a person is an employee”. The list would tell all. Moreover, the employer’s argument effectively ousts the Board’s jurisdiction to determine all questions which arise in any matter before it, including whether a person is an employee.”

18. What is before the Board at this time is the application for certification, not a section 108(2) application. Therefore, it would be premature and inappropriate to rule in advance whether a section 108(2) application could ever be brought with respect to the above mentioned Regional Managers.

19. The applicant asserts that the classifications of Manager and Regional Manager are separate and distinct. There are three Managers employed by the responding parties. The applicant asserts that the classification of Regional Manager is clearly subordinate to Manager and therefore is not excluded by virtue of the bargaining unit description. The applicant asserts that the employer is now attempting to resile from its agreement that the line of exclusion is Manager.

20. Further, the applicant objects to the release of a fresh count in the event that Regional Managers are included in the unit on the grounds that the disclosure of an amended count would reveal to the employer the number of Office Supervisors/Regional Managers who signed cards. If all such employees signed cards, then the employer would learn the specific identities of union supporters, contrary to section 113 of the Act. Although not entirely clear, it appears that the applicant requests the Board to issue a final certificate and reserves its right to make an application pursuant to subsection 108(2) to determine whether Regional Managers are employees within the meaning of the Act.

21. In a further response dated February 21, 1994, the responding party cited the case of *Ivaco Inc.*, [1987] OLRB Rep. April 511 for the proposition that the list is used by the Board for purpose of ascertaining the number of employees in the bargaining unit and the composition of the bargaining unit including managerial and other exclusions. The responding party also confirmed its position that Regional Managers were excluded from the list because they exercised managerial functions. They further requested a clarity note confirming the exclusion of the four Regional Managers and the other three Managers. In the alternative, they requested a bar prohibiting the applicant from bringing a section 108(2) application with respect to the status of Regional Managers.

22. In a further response dated February 28, 1994, the applicant sought to distinguish the *Ivaco Inc.* decision and opposed both the request for a clarity note and the imposition of a bar to a section 108(2) application.

Decision

23. There are two possible options. First, the Board could hold the parties to their agreements made during the certification waiver process and certify the applicant on the basis of those agreements. Alternatively, the Board could direct the parties to return to negotiations with respect to any disputed issues. On the one hand, the Board’s certification waiver procedure depends significantly on agreements made by parties. The Board is reluctant to permit parties to resile from those agreements. If parties were permitted to change their minds at will, the waiver procedure would grind to a halt and the number of hearings would increase dramatically. On the other hand, to hold the applicant to their agreement has the effect of *potentially* excluding individuals from the protection of the Act.

24. The Board has discussed the importance of obtaining parties’ positions with respect to

bargaining unit descriptions and employees on the list prior to the announcement of the count. In *Fort Erie Duty Free Shoppe Inc.*, [1991] OLRB Rep. Nov. 1268, the Board stated:

8. ... There is no question that parties are intended to deal with issues related to the bargaining unit description and the list of employees *prior* to the announcement of the count. Nor is there any question that at least part of the rationale for that manner of proceeding is to avoid the possible gerrymandering adverted to by the applicant and certainly to avoid the “endless meanderings without map or compass” referred to in the *Santa Maria Foods* case, *supra*.

9. ... As the other cases cited in *Santa Maria Foods* demonstrate, the Board is extremely reluctant to allow any party to raise new issues or take new positions with respect to bargaining unit or employee list issues once the count has been disclosed. (my emphasis).

10. However, all of this does not mean that all issues regarding bargaining unit descriptions and employee lists must be fully resolved and determined prior to any announcement of the count. That requirement would clearly subvert the process in many cases. Positions on these issues may ultimately appear marginal and fully capable of quick resolution in face of the count. To require final determination and possible litigation of these issues before proceeding to the next step in the process hardly seems productive. Indeed, the logical extension of this position might lead one to wonder when, if ever, the Board would be in a position to exercise its discretion under section 6(2) of the Act to grant interim certification, since in those cases there are, by definition, unresolved issues regarding the composition of the bargaining unit.

11. Thus, the practice of the Board is to require the parties to deal with and to finalize their positions with respect to bargaining unit descriptions prior to dealing with employee list issues and to deal with and finalize their positions with respect to employee list issues prior to any announcement of the count. This is precisely what we understand the Board to have said in *Santa Maria Foods* when it observed that the Board:

“does not announce the membership count until the count of employees in the unit is determined, *subject, of course, to such outstanding challenges to the list as may have been to that point in the hearing.*”

[emphasis added]

25. The Board concludes that the importance of the waiver procedure requires that parties be held to agreements made during that procedure, in the absence of extraordinary circumstances. On the facts of this particular case, the applicant does not assert any extraordinary circumstances which would cause us to permit them to resile from their failure to challenge the list. The applicant, having considered the list and its membership evidence, made a decision not to challenge the omission of the Regional Managers from the list. Since they were in a certifiable position whether or not they challenged the list, it was open to them to make their challenges, obtain a count and be certified on an interim basis. They did not so. They are bound by their agreement on the list of employees.

26. The Board further declines to permit the responding party to resile from their agreement with respect to the geographic scope of the bargaining unit and declines to add a clarity note to such agreed upon description. In the result, there are no outstanding issues in dispute with respect to this certification application.

27. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

28. Having regard to the agreement of the parties, the Board finds that:

all employees of CAA Northeastern Ontario Auto Club and Ontario Motor League Worldwide Travel (Sudbury) Inc. in the Districts of Cochrane, Manitoulin, Nipissing, Parry Sound, Sud-

bury, Timiskaming and the Regional Municipality of Sudbury, save and except managers, persons above the rank of manager, Executive Secretary to the President and Administrator: Accounting and Compensation,

constitute a unit of employees appropriate for collective bargaining.

29. In accordance with the Rules of Procedure respecting applications for certification, the named employer has filed a list of employees in the bargaining unit, together with sample signatures for the employees on that list.

30. In support of its application for certification, the applicant union filed documentary evidence in the form of membership application cards. The cards are signed by each employee concerned, are dated within the six-month period immediately preceding the certification application date, and are supported by a duly completed Declaration Verifying Membership Evidence.

31. The Board is satisfied, on the basis of all of the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on January 12, 1994, the certification application date, had applied to become members of the applicant on or before that date.

32. A certificate will issue to the applicant.

33. As stated previously, this is an application for certification, not an application pursuant to section 108(2) of the Act. The Board declines to impose any bar on the applicant's filing of such an application. The panel hearing such application, if any, can determine whether to permit such application to proceed. We do note, however, that the Board has declined to inquire into a section 108(2) application where the parties had agreed to exclude the disputed employees from the list for the purpose of the count. (*Ivaco Inc.*, *supra*).

3842-93-U National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 636, Applicant v. Canada Stamping and Dies Limited Responding Party

Strike - Strike Replacement Workers - Unfair Labour Practice - Employer submitting that preconditions for application of section 73.1 of the Act not met because of various aspects surrounding strike vote, including length of time between vote and calling the strike, wording of ballot and other matters - Board deciding that preconditions satisfied - Board ruling that manager who had been promoted from bargaining unit after giving of notice to bargain precluded from doing struck work - Board finding that driving not work ordinarily performed by anyone and that performance of such work during the strike not violating the Act - Board ruling that use of non-bargaining unit 'occasional' workers to do struck work violating the Act - Employer directed to cease and desist from using replacement workers in breach of section 73.1 of the Act

BEFORE: K. G. O'Neil, Vice-Chair.

APPEARANCES: Lisa Kelly, Ron Joyal and Sandra Sherman for the applicant; Robin B. Cumine and Bob Hughes for the responding party.

DECISION OF THE BOARD; March 2, 1994

1. This is an application pursuant to section 91, alleging breaches of sections 3, 65, 67, 71 and 73.1 of the *Labour Relations Act*. These are the Board's reasons for its decision dated February 22, 1994, which allowed the complaint in part.

2. The facts of this case, which were not largely in dispute, raise questions about the applicability of section 73.1, the replacement worker provisions, to part-time and occasional employees who are not part of the bargaining unit, as well as to an employee promoted out of the bargaining unit to a position created after the date of notice to bargain. The union pleaded a number of sections of the Act, and alleged anti-union motivation. As will be seen below, however, the nub of the issue relates to section 73.1, which provides as follows:

73.1- (1) In this section,

“employer” means the employer whose employees are locked out or are on strike and includes an employers’ organization or person acting on behalf of either of them; (“employeur”)

“person” includes,

- (a) a person who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations, and
- (b) an independent contractor; (“personne”)

“place of operations in respect of which the strike or lock-out is taking place” includes any place where employees in the bargaining unit who are on strike or who are locked-out would ordinarily perform their work. (“lieu d’exploitation à l’égard duquel la grève ou le lock-out a lieu”)

(2) This section applies during any lock-out of employees by an employer or during a lawful strike that is authorized in the following way:

- 1. A strike vote was taken after the notice of desire to bargain was given or bargaining had begun, whichever occurred first.
- 2. The strike vote was conducted in accordance with subsections 74(4) to (6).
- 3. At least 60 percent of those voting authorized the strike.

(3) For the purposes of this section and section 73.2, a bargaining unit is considered to be,

- (a) locked out if any employees in the bargaining unit are locked out; and
- (b) on strike if any employees in the bargaining unit are on strike and the union has given the employer notice in writing that the bargaining unit is on strike.

(4) The employer shall not use the services of an employee in the bargaining unit that is on strike or is locked out.

(5) The employer shall not use a person described in paragraph 1 at any place of operations operated by the employer to perform the work described in paragraph 2 or 3:

- 1. A person, whether the person is paid or not, who is hired or engaged by the employer after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
- 2. The work of an employee in the bargaining unit that is on strike or is locked out.

3. The work ordinarily done by a person who is performing the work of an employee described in paragraph 2.

(6) The employer shall not use any of the following persons to perform the work described in paragraph 2 or 3 of subsection (5) at a place of operations in respect of which the strike or lock-out is taking place:

1. An employee or other person, whether paid or not, who ordinarily works at another of the employer's places of operations, other than a person who exercises managerial functions.
2. A person who exercises managerial functions, whether paid or not, who ordinarily works at a place of operations other than a place of operations in respect of which the strike or lock-out is taking place.
3. An employee or other person, whether paid or not, who is transferred to a place of operations in respect of which the strike or lock-out is taking place, if he or she was transferred after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
4. A person, whether paid or not, other than an employee of the employer or a person described in subsection 1 (3).
5. A person, whether paid or not, who is employed, engaged or supplied to the employer by another person or employer.

(7) The employer shall not require an employee who works at a place of operations in respect of which the strike or lock-out is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the agreement of the employee.

(8) No employer shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten to dismiss a person or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of the person's refusal to perform any or all the work of an employee in the bargaining unit that is on strike or is locked out.

(9) On an application or a complaint relating to this section, the burden of proof that an employer did not act contrary to this section lies upon the employer.

Section 73.1(5) is the most centrally relevant to the circumstances of this case, which deals with one plant location.

3. The company produces a variety of metal stampings and dies for the automotive, appliance and other industries. The applicant union has had bargaining rights at the company's stamping plant for over forty years. It was agreed for the purposes of this proceeding that part-time employees, including occasional, are not employees in the bargaining unit, although the union may originally have had bargaining rights for them.

4. Notice to bargain was given on August 24, 1993, after which bargaining started. Bargaining did not result in a collective agreement and a strike vote was conducted on October 18,

1993. All eight people in the bargaining unit voted at the meeting where the strike vote was taken, by secret ballot, and a margin of more than 60% in favour was obtained.

5. A “no-Board” report was given on November 8, 1993. A lawful strike commenced on February 7, 1994.

6. The employer suggested that the Board should find that the preconditions for the application of section 73.1 did not apply. Counsel says that a number of aspects of the facts about the vote support this, including the length of time between the vote and the calling of the strike, as well as the fact that the notice of the meeting where the vote was held did not say that a vote would be held, and the fact that the ballot only asks whether a voter is “in favour” of striking, rather presumably than authorizing a strike.

7. In considering the argument about the preconditions to the application of the section, we note that the notice of the meeting was posted prominently between October 12 and the date of the vote, October 18. As well, the bargaining unit employees had been told verbally by the union’s Plant Chairperson, Sandra Sherman, that the meeting would be to determine if they were going on strike. More fundamentally, the whole bargaining unit came and voted. No one complained that they should have been included and were not. There was one person who had been on lay-off, but since his right to recall had expired, Ms. Sherman determined that he was no longer in the bargaining unit. The employer did not suggest this person should have had the opportunity to vote. In any event, given the breadth of the margin in favour of the strike his vote would not have affected the margin of 60% even if it had been against.

8. As to the question of the timing of the vote in relation to the start of the strike, there is no indication in the statute that the vote has to be closer to the calling of the strike than this was, just under four months. Further, there was no indication that any event bearing on the employees’ opportunity to vote on the issue occurred between the holding of the vote and the calling of the strike. If a lapse of time, without more, between the authorization and calling of a strike had been intended to be a bar to relief, it would have been up to the legislature to make that clear.

9. As to the wording of the ballot, it is clear in our view that voters were being asked for a strike mandate. The statute has no specific requirement as to what question the voters will be asked to authorize a strike. In the circumstances, we are of the view that the preconditions set out in section 73.1(2), which incorporate those in section 74(4) and (6), were met.

10. There are two general areas which deserve some attention before we turn to the specific disputed individuals: the meaning of the word “engaged”, and of the phrase “the work of an employee in the bargaining unit” in section 73.1(5).

The Meaning of Engaged

11. Section 73.1(5) provides that an employer shall not use a person who is “hired or engaged” after, on our facts, the date of the notice to bargain, to do the work of an employee in the bargaining unit which is on strike. It is clear that this section demonstrates a general legislative intention to limit the employer’s use of new people to do the work of striking employees. Union counsel referred to this as a “shapshot” taken at the earlier of the notice to bargain or the commencement of bargaining, which is then frozen if a strike takes place. Because of the issues before me concerning occasionals and a newly created position filled by an existing employee, it is necessary to consider what the legislature meant by using the word “engaged” in addition to the word “hired”.

12. Union counsel urges the Board to take a purposive approach and find that the wording “engaged” is broad enough to cover the creation of a new position or calling in occasionals which has the result of increasing the employer’s complement available to do bargaining unit work. Referring to *Canadian Red Cross*, Board File No. 3767-92-U decision dated January 10, 1994, as yet unreported [now reported at [1994] OLRB Rep. Jan. 34], and the *Interpretation Act*, section 10, counsel says that a fair large and liberal reading of the statute should lead the Board to accept the union’s argument.

13. The employer argued that “engaged” was meant to provide for unpaid workers who might not technically be hired. Thus there is a pairing in section 73.1(5): “hired” is paired with paid workers, and “engaged” with unpaid. We are urged to find that the initial hiring date is determinative on the facts before us.

14. There are several plain meanings of the word “engaged”. They include the idea of occupied or employed in a non-specific sense, e.g., the parties are engaged in bargaining, or the man is engaged in operating a press. As well, engaged has the sense of commitment to a specific end, such as engaged to be married. It also has a common sense quite akin to “hired”. But presumably the legislature was not just being repetitious, and intended something different than “hired” when it used the phrase “hired or (usually a disjunctive word) “engaged”. Engaged is used in the passive voice, i.e. the person is engaged by the employer, but the statute does not further qualify the term. It is clear that it was meant, at least, to cover persons who were not paid, as the employer argues. However, there is nothing in the section to indicate that it is limited to that meaning. We are of the view that an appropriately purposive interpretation of the word in context includes contracting with a person for a specific task or discrete period of time. We will deal with its application to the people in dispute below.

The work of an employee in the bargaining unit

15. The question of how to give meaning to the phrase in section 73.1(5) “the work of an employee in the bargaining unit” also deserves some general attention. We note firstly that the legislature did not use the wording “bargaining unit work”, words sometimes associated in labour relations parlance with the idea of work reserved to the bargaining unit. Rather, the legislature used wording which appears broader as it focuses on the work of the employee, i.e. what he or she actually has done, which may be more or different than what is mentioned in the collective agreement. Thus, it is our view that the terms of the collective agreement, while obviously centrally relevant to what that work might be, are not the only relevant matter. It is also important to look at what work the bargaining unit employee was doing, whether or not it is specifically addressed by the collective agreement. See also *Famous Players Inc.*, [1993] OLRB Rep. Dec. 1270 at paragraphs 43 and 44, and *Famous Players Inc.*, Board File No. 3252-93-U, decision dated February 4, 1994, as yet unreported [now reported at [1994] OLRB Rep. Feb. 131].

16. We also observe that part of the legal context in place at the time of the Bill 40 amendments is the arbitral jurisprudence on the subject of work in a bargaining unit, and Board decisions in other contexts, such as section 108(2). This jurisprudence has, by and large, discounted incidental functions as significant in its determinations. We are not of the view that the legislature intended to capture every action, no matter how incidental to the person’s normal job in section 73.1(5), 2 and 3. An approach which looks to the substantive, regular content of the work of an employee in the bargaining unit is the most appropriate in our view.

17. As to functions performed by both employees inside and outside the bargaining unit, they may be the work of both. In order to give a sensible interpretation to the section as a whole, it may be appropriate to determine where the work of an employee in the bargaining unit leaves off

and that of an occasional begins by reference to the relationship if any between the work of each type of employees, including the relative proportion of work done in normal, non-strike periods.

18. The collective agreement here provides a recognition clause which refers only to a Board certificate, apparently from 1949, which neither party could produce. The other portion of the collective agreement which is of assistance is Appendix B which sets out the classifications in the bargaining unit as follows:

TOOL AND DIE DESIGNER
TOOL AND DIE MAKER
MILLWRIGHT
PRESS MECHANIC
BLANKING PRESS OPERATOR & SET-UP
MACHINIST
GENERAL LABOUR & Material Handler
MAINTENANCE HELPER
A) PRESS OPERATOR 2ND OPERATION
B) MACHINE OPERATOR

19. There was evidence that bargaining unit employees performed driving from time to time, when there was a rush errand or delivery. Normally the company uses an outside carrier to do its driving. Salaried (management) personnel, including the shipper and receiver, occasional employees, as well as a variety of bargaining unit workers have driven for the company.

20. Sandra Sherman, the union's plant chairperson, testified that in addition to her normal job operating a press, she also cleaned the factory, drove truck and dealt with quality assurance files from time to time. She considered the work of operating a press to include packing, and rework of things coming off the press. Other bargaining unit employees also do packing, including counting and weighing, driving the towmotor to empty scrap bins, setting up jobs on the machines, and drafting. Salaried people can also be seen doing these jobs from time to time. Ms. Sherman's estimate was that salaried personnel might work a press on average one to two hours of the bargaining unit shift to adjust a machine, change its set-up, or for training purposes. She has also seen salaried personnel drive forklift.

21. Occasional employees have also done driving, rework, and deliveries. Ms. Sherman testified that before the last year, part-time people either stayed long enough to "make" the union, i.e. 60 days, or were laid off. There is also one 'regular' part-time employee who attends at work every day for part of the day. Company counsel notes that the company has hired people other than the eight people who voted for a long time, and the work they did was considered their work, not bargaining unit work.

22. Bob Hughes, the company's General Manager, testified that since the strike the shipper and receiver has been doing duties much the same as before the strike, i.e. shipping and receiving goods, moving raw material into the warehouse, assisting with the set-up of equipment and driving on occasion. He has also monitored the operation of machines, which was work previously done by members of the bargaining unit. Although nothing was pleaded in regards to the shipper and receiver himself, the union argued that evidence of what he was doing during the strike was relevant to whether any of the people complained of were doing work contrary to 73.1(5) 3, which limits people hired or engaged after the notice to bargain from "freeing up" others to do bargaining unit work.

23. With these general considerations in mind, we will turn to the specific individuals in issue.

Steve Yeoman

24. Steve Yeoman was a bargaining unit tool and die designer, functioning as a lead hand, until his voluntary promotion on January 3, 1994 to a newly created position entitled Tool and Die Coordinator. Notice of the promotion was given to the union on December 20, 1993 and the general areas of responsibility of the new position were set out. These included supervisory and design work as well as continuing to do tool and die work that Mr. Yeoman had performed while in the bargaining unit. The removal of certain work from the bargaining unit was grieved by the union. This has not yet been resolved, and the union has indicated it will pursue the matter at arbitration.

25. Prior to Mr. Yeoman's promotion, the management staff consisted of a general manager, a plant supervisor and a customer service and quality assurance person. Prior to the creation of Mr. Yeoman's new position, the administrative portion of his job was done primarily by the Plant Supervisor, Terry Hainer. The General Manager, Bob Hughes, decided to create the new position sometime in the fall of 1993, when he saw that many administrative duties were not getting done because of growth in business. Mr. Hughes testified that in the last 60 days, which would mean since mid-December, he had taken orders for five new dies, which would alone be equal to 30% or more of the company's work in 1993. Orders were "way up". In addition, Mr. Hughes testified that more work was necessary to develop a program of upgrading and dealing with problems with existing dies and their maintenance. This was the result of the fact that they would be used more with the increased volume, which had recently necessitated the creation of a second shift. The company also wants to do the groundwork to make it possible for it to bring "in-house" more of the work it is currently contracting out. Thus the new position includes managing the outside die contracts, as well as involving Mr. Yeoman more in engineering matters and customer meetings about what the dies and products will be. Some of the quoting had been done by Mr. Yeoman while he was in the bargaining unit, but in the future, he will be in charge of entire die making projects, from quoting to finishing.

26. Mr. Hughes said that he first learned of the replacement worker provisions in the fall of 1993, at which time he only had a general awareness of them. He assumed that managers could work during a strike. In the two weeks leading up to the strike, Mr. Hughes obtained more specific legal advice. When asked when he learned of the union's positive strike mandate, his answer indicated sometime after February 2, 1994. Mr. Hughes denied promoting Mr. Yeoman in part to keep him working during the strike, asserting that the company expected to settle the negotiations without a strike. Mr. Hughes said that Mr. Yeoman was moved purely for business reasons and to give him an opportunity for growth. It was clear from Mr. Hughes' evidence that the company is intending to continue operating during the strike, and that all the managers are working during the strike. Continuing to operate would not, in the Board's view, be possible without the performance of bargaining unit work.

27. The union argues that a promotion to a newly created position falls within the meaning of the word "engaged" because, when looking at the mischief the legislature was addressing, it could hardly have been its intention that the company could create new management positions and fill them from the bargaining unit to get it through the strike. Mr. Yeoman's promotion was an attempt to provide the company with additional management people, including one with bargaining unit skills and experience, to do the work of the bargaining unit during the strike, submits counsel.

28. The union's position is that the company is entitled to create new management positions after the notice to bargain, but cannot use them during the strike. Referring to section 73.1(6) to

support her argument about section 73.1(5), counsel observes that the whole section is aimed at limiting the employer's pool of available labour.

29. The union also alleges that the promotion of Mr. Yeoman was made in bad faith, and is thus contrary to sections 15, 65, 67 and 71. The union says there are grounds for finding motive on the facts of this case, particularly because of the timing of the creation of the new position. The union challenges the logic of creating a position after the strike vote unless it was because of it, at least in part. Union counsel argues that since the onus of proving that the company is not thinking up schemes to avoid the new provisions is on the company, it must give a more convincing explanation than it did. Counsel refers in particular to the fact that Mr. Hughes testified that he heard about the order for five new dies in December or January, which means he is not even sure he had heard about the major increase in work before he created the new position.

30. The union also argues that the position is not bona fide management in that Mr. Yeoman supervised people as a lead hand prior to his promotion, and there is no other duty in the new position which would require the job to be out of the bargaining unit. A similar position is reflected in the grievance lodged against the new position.

31. As remedy, the union asks the Board to return Mr. Yeoman to the bargaining unit until the resolution of the strike or grievance. Counsel argues that by his very existence other managers are freed up to do more bargaining unit work. He should be stopped from doing both bargaining unit work and other managerial work, asserts counsel.

32. The company's position is that Mr. Yeoman was offered a promotion and accepted, and that nothing in the Act prevents him from continuing. Company counsel argues that the reasons Mr. Hughes gave for the promotion went completely unchallenged by the union and thus there is no basis for a finding of anti-union motivation. Counsel underlines that the grievance is not the issue before the Board, and that this proceeding should not be allowed to eclipse the collective agreement's ongoing grievance procedure.

33. Company counsel argues that the legislature would have had to make it much clearer for the Board to find that promotions out of the bargaining unit were not allowed after the notice to bargain. He argues that would be adding a new class of employee to the list of exclusions and that it would be torture to the wording of the Act to move Mr. Yeoman out of his position.

34. Having carefully considered the parties arguments, I am persuaded that the filling of this position, which never existed before, is a circumstance covered by the phrase "hired or engaged". Although the legislation does not list that particular eventuality, we are of the view that it was not necessary. The general word is broad and it is sensible that the legislature did not attempt to anticipate every fact situation. It is very clear that if a new management position had been created and filled by someone not already in the employ of the company, it would be covered by section 73.1(5). We are not of the view that, from a purposive point of view, it should matter whether the position is filled from individuals who had been working in a different position for the employer, or by a new employee. Section 73.1(5) seems squarely aimed at "extra" people, people beyond the employee complement in place at the date of notice to bargain. It is not clear that the section was meant to focus on the individual identity of the person in question. From a purposive point of view, the size of the complement available to do the work of the striking workers seems more central. Creating and filling an extra position in management directly before a strike, especially when the job purports to bring with it work of employees in the bargaining unit, appears to be at odds with the purpose and general scheme of the replacement worker provisions set out above. As it was put in *Famous Players Inc.*, cited above, at paragraph 42, the statute prohibits employers from using replacement workers to get the strikers' job done.

35. Taking this purposive approach, the Board is of the view that although Mr. Yeoman, as an individual, had been hired before the date of notice to bargain, no one had yet been engaged to fill the new management position. We note that the legislature saw fit to specify, as it did not do elsewhere in the statute, that the word “person” in section 73.1 includes a person exercising managerial functions. Mr. Yeoman’s engagement in early 1994 to do the duties of the new management position, in our view, makes him a person who cannot be used to do either the work of an employee in the bargaining unit on strike, or the work of anyone who is performing that work. (We note that the issue of the filling of a management position existing at the time of the notice to bargain was not before us, nor is it necessary to decide here). Thus, Mr. Yeoman should not be used to do the work of an employee in the bargaining unit, such as operating the presses, or any of the work ordinarily done by other managers such as Terry Haines, who are doing bargaining unit work during the strike, in light of sections 75.1(5), 2 and 3. If there is work involved in the newly created position that, before its creation, was not ordinarily performed by any other manager, who is doing bargaining work during the strike, Mr. Yeoman is entitled to perform that work during the strike.

36. I am not of the view that the evidence supports a finding of breach of any of the other sections pleaded in respect of Mr. Yeoman and those allegations are dismissed.

37. It should be noted that nothing in the above remarks is intended to reflect in any way on the outstanding grievance, which I specifically refrain from commenting on, except to say that the issue before me appears to be a very different one from that under the collective agreement.

Greg O’Neil

38. Greg O’Neil was hired on February 1, 1994 as a tool and die maker to fill in until a new tool and die maker could be hired to make up for the partial vacancy caused by Mr. Yeoman’s promotion as well as an increase in volume in the tool and die shop. He worked from February 1 to February 7 in the tool and die department. The parties do not yet treat him as a member of the bargaining unit, as the collective agreement provides that it is only after 60 days that he would be required to join the union and be in the bargaining unit. Since the strike started he has driven a truck, which the union alleges is work done by employees in the bargaining unit. (Although Mr. O’Neil has also worked at a plant to which the company sub-contracts work, the union did not challenge anything related to Mr. O’Neil other than his having driven for the company). The union says that the use of Mr. O’Neil is a clear case of breach of section 73.1(5), since he had no employment history with the company at all prior to the notice to bargain.

39. In the alternative, the union argues that Mr. O’Neil is doing the work of the shipper and receiver when he is driving, and the shipper and receiver is a person who is doing bargaining unit work. Although the union is not in this proceeding challenging the right of the shipper and receiver to do bargaining unit work, it does say that while he is doing bargaining unit work, no one is allowed to do his work, which would include driving truck. Thus, the union says Mr. O’Neil should not be used either because of section 73.1(5), 2. or 3.

40. As to the company’s argument that there is no collective agreement bar to managers or other non-bargaining unit people doing bargaining unit work, union counsel says that it does not change the nature of the work for the purposes of section 73.1. Counsel urges us to find that Mr. O’Neil is an accretion to the work force in breach of section 73.1.

41. The company maintains that the evidence does not support a finding that driving is bargaining unit work. It is usually done by outside carriers. The only exception is for rush deliveries or other errands. One should not say that work that is done once by a bargaining unit person is

thereby the work of a person in the bargaining unit. Driving, says counsel, is not the work of an employee in the bargaining unit, nor does the collective agreement provide a bar to anyone doing that work. Furthermore, the company says the evidence does not indicate that the shipper or receiver was freed up for even one minute.

42. We are of the view that driving is work that is incidental to the work of employees in the bargaining unit, and that the evidence did not indicate that it is work ordinarily performed by anyone, including the shipper and receiver. It is ordinarily performed by an outside carrier. Thus we are not of the view that it is work covered by either section 73.1(5), 2 or 3.

43. The complaint in relation to Mr. O'Neil is dismissed.

Sherry Hainer

44. Sherry Hainer is the wife of the production supervisor. She has worked on and off for the company as a casual or occasional employee since before the notice to bargain. Since August 1993, she worked a total of 200 hours, in 9 different weeks. Her minimum hours in those 9 weeks was 5.5 and the maximum 37.35. There are often gaps between stints of working. For instance, Ms. Hainer worked 19.2 hours in the week of September 21 and did not work again until October 26. There is no indication of what hours, if any, she worked after November and before the strike. When she does not work, her name does not appear on the schedule. There appears to be no regularity to her work, and no task which is predominately the focus of her work.

45. Ms. Hainer has worked during the strike, operating small machines, doing rework, sorting and packing. This is work that has been performed by members of the bargaining unit on strike, as well as by casual employees on occasion, for example when there is a backlog.

46. Mr. Hughes testified that when the company uses part-time or occasional employees, "it is not a regular thing", with the exception of one employee who has fixed hours, who is not here in issue. The type of work Ms. Hainer has done in the past has included sorting and rework, which Mr. Hughes said are things gone wrong, which do not necessarily occur regularly. He said that someone like Ms. Hainer would not have regularly assigned hours, "she would just be called in in each situation."

47. The company has no obligation to call casual employees, and they are free to decline work. There is no guarantee of recall, but there is no lay-off notice or other similar documentation when they finish a task. Ms. Hainer works substantially more than other occasional employees, some of whom have worked only once or twice cleaning floors, for example.

48. The company argues that Ms. Hainer was engaged long before the notice to bargain, that she was in fact working in August, 1993, and had a pattern of employment consistent with what she is doing during the strike. Counsel suggests the Board would have to write something into the collective agreement or the Act which is not there in order to prevent her (and any other occasional) from working during the strike. The Act does not govern the rights of non bargaining unit employees who work at that location, in counsel's submission. Their work has included bargaining unit work before the strike, and should include it during the strike as well. The company maintains that the replacement worker provisions were not intended to disrupt what was there before, but to prevent changes to the status quo. The company underlines that these are employees of long-standing and should not be considered replacement workers at all.

49. The union argues that, although Ms. Hainer works more than the other casuals and is a more visible presence around the workplace, the principles which apply to her and the other casu-

als are the same. There are no obligations between the parties between periods of work; they should be considered to be engaged afresh when they take on a new commitment for the company. Where there was a month gap between the end of September and the next time Ms. Hainer worked, counsel argues that the company should not be able to use Ms. Hainer either.

50. The company argued in reply that the union is trying to force these people onto a strike, with no participation in the strike vote, which would be directly contrary to the purpose of the Act.

51. We have considered the evidence as a whole, and are of the view that Ms. Hainer is a person who was engaged since the date of the notice to bargain. Although Ms. Hainer has been used in the past, the evidence is clear that it is to “fill in” and as an adjunct to the regular complement of people for a specific period or task. It is to cover events such as “things gone wrong”, in Mr. Hughes’ words. We are of the view, that with a purposive view of the statute in mind, Ms. Hainer was engaged anew each time she committed to a specific task or period of time. The nature of the arrangement is made more clear by the fact that she could turn down any engagement offered to her. On the evidence before us, she was specifically engaged after the notice to bargain, i.e. at the commencement of the strike, to do the very work the bargaining unit employees would have been doing if they were not on strike. It cannot be said that Ms. Hainer was doing “her own work”, as the evidence indicates it has always been work which was defined by work in excess of the work done by full-time bargaining unit workers. Nor does the work during the strike coincide with any pre-existing pattern. We note there is no evidence that she has worked regularly since November despite orders being way up, and the plant being so busy that it needed a second shift. There was no regular pattern of work reserved to Ms. Hainer, nor evidence of her use to staff the plant on some kind of ongoing basis, as in other industries where casual and other part-time employees are used to staff the normal work of the enterprise, if on a more flexible basis of scheduling. The circumstance of being offered a new engagement at the outset of the strike to do the normal work of the bargaining unit, rather than excess or things gone wrong, is one that we find is in breach of section 73.1(5).

John Hewitt

52. John Hewitt is a son of the owners of the company and a full-time student. He, too has worked as a casual employee prior to the strike, but less often than Ms. Hainer. From time to time, the company has hired sons and daughters of both management and bargaining unit employees to do casual work including cleaning floors and other work. Since the start of the strike Mr. Hewitt has done die sharpening in the machine shop, work which has previously been done both by himself and bargaining unit employees. Mr. Hewitt is called in when there is a backlog of work or the unavailability of someone else.

53. Union counsel argues that Mr. Hewitt is only called in when something unforeseen or a special project comes up. Counsel says there is something finite to each task or engagement, and that each time they are called in for a task, they are newly engaged, within the meaning of section 73.1. Counsel cites the examples in the evidence of the use of sons and daughters: three Saturdays to scrape floors, filling in for a sick leave. Counsel says it would be contrary to the purpose of the Act to say that a company could operate during a strike by virtue of calling in every person who ever worked for it.

54. Union counsel notes that Mr. Hewitt has only worked about three times in the last six months, and argues that in light of the reverse onus, the company has failed to discharge its onus to prove that he was not engaged since the date of the notice to bargain.

55. The employer argues, as for Ms. Hainer, that Mr. Hewitt is an existing employee who

should be allowed to work during the strike. Counsel urges us to limit the categories of people the company cannot use to those explicitly set out in the statute.

56. We are of the view that the considerations which apply to Ms. Hainer apply ever more so to Mr. Hewitt, since his attachment to the workforce here is very tenuous. We find he is a person engaged since the notice to bargain, and is therefore a person who is not to do the work of an employee in the bargaining unit, or that of anyone doing that work for the duration of the strike.

Summary

57. Having considered the evidence and arguments of the parties the complaint is allowed in respect of section 73.1(5) except with respect to driving duties, and is dismissed in all other respects.

58. The following are the Board's orders:

1. The employer is prohibited from using Steve Yeoman, Sherry Hainer and John Hewitt to do the work of employees in the bargaining unit on strike, or the work ordinarily done by anyone who is performing the work of striking employees. However, driving is not a task which falls into either of those categories.
2. The employer is to mail to each of its employees a posting in the form attached, within one week of its receipt of this decision.
3. The employer is to cease and desist from using replacement workers in breach of section 73.1

59. All other matters of remedy are remitted to the parties for their consideration. The Board remains seized to deal with any difficulty implementing this decision or any failure to agree on any matter relating to any further remedy.

Appendix 'A'

Labour Relations Act

NOTICE TO EMPLOYEES

By Order of the Ontario Labour Relations Board

We have mailed this Notice in compliance with an Order of the Ontario Labour Relations Board. After a hearing in which the Company and the trade union participated, the Ontario Labour Relations Board found that we violated the *Ontario Labour Relations Act* by using Steve Yeoman, Sherry Hainer and John Hewitt to do work of employees in the bargaining unit during the strike. The Ontario Labour Relations Board also found that using Greg O'Neil to do four hours of driving was not a breach of the Act.

Canada Stamping and Dies Ltd.
Per: _____
(Authorized Representative)

This is an official notice of the Board.
Dated this 2nd day of March, 1994.

3186-92-M United Steelworkers of America, Applicant v. Cooper Industries (Canada) Inc., Responding Party

Discharge - Discharge for Union Activity - Interim Relief - Remedies - Unfair Labour Practice - Board directing interim reinstatement of employee discharged during union organizing campaign

BEFORE: *Judith McCormack*, Chair, and Board Members *J. A. Rundle* and *K. Davies*.

APPEARANCES: *Brian Shell* and *Barbara Jones* for the applicant; *R. K. Lee Shouldice*, *M. J. Steele*, *B. Whitley* and *S. Lawrence* for the responding party.

DECISION OF JUDITH McCORMACK, CHAIR, AND BOARD MEMBER K. DAVIES: March 9, 1994

1. The name of the responding party is amended to read: "Cooper Industries (Canada) Inc.".

2. This is an application under section 92.1 of the *Labour Relations Act* for an interim order relating to Board File 3185-92-U. That file involves a complaint under section 91, alleging that Heather Kuepfer was discharged in violation of the Act. By way of interim order, the applicant requests that Ms. Kuepfer be reinstated to her employment position in the responding company's Stratford manufacturing plant. The responding party asserts that Ms. Kuepfer's employment was terminated for reasons unrelated to union organizing or the exercise of her rights, and opposes the interim order.

3. In accordance with Rule 88, the applicant filed its application on Thursday, February 4th, after delivering a copy of it, the complaint under section 91 and a copy of the response form to the responding company. The responding company then filed its response on Monday, February 8th after delivering a copy of it to the applicant in accordance with Rule 89. As part of their filings, both parties submitted first-hand declarations in regard to their respective evidence and written representations in support of their positions. In addition to this material, the Board decided to hear oral arguments, and a hearing was scheduled for Tuesday, February 9, 1993.

4. At the conclusion of the parties' oral arguments, we reserved our decision but advised counsel that we would attempt to issue it as soon as possible, keeping in mind the inherent urgency of this kind of matter. On February 10th, the Board issued the following decision:

A majority of the Board, Board Member Rundle dissenting, directs that Heather Kuepfer be reinstated to her employment position pending the final disposition of the matter in Board File 3185-92-U. Our reasons will follow.

We now provide our reasons.

5. The applicant union asserts that Ms. Kuepfer was one of three employees seeking to organize a union at the company's wheel plant. It was common ground between the parties that just prior to these events, Ms. Kuepfer had been on maternity leave. When she returned to work at the beginning of January 1993, she was of the view that certain aspects of her job had changed. As a result, the parties agree, she complained aggressively about this to a number of people, particularly Lori Welch, another employee whom Ms. Kuepfer felt was performing aspects of her former position. On January 12th, Ms. Kuepfer states that she spoke to a co-worker in the presence of other employees about organizing a union. There is no dispute that she was suspended that day.

The company states in its material that Ms. Kuepfer was suspended for being rude and abrasive to Ms. Welch and to the plant manager, and for alleging that the company was improperly disposing of asbestos brakes.

6. Ms. Kuepfer was absent on January 13th and 14th. When she returned to work on January 15th, she states in her declaration that she spoke to another employee in the presence of others with respect to organizing a union. The company asserts in its material that Ms. Kuepfer was spoken to on that day about missing work, a statement which appears to be disputed by Ms. Kuepfer.

7. Ms. Kuepfer sets out in her declaration that she spent Sunday, January 17th, attending a union organizing meeting and visiting the homes of other employees to persuade them to sign union cards. She also asserts that on January 18th she was ill and attended at her doctor's office. When she returned to work the next day, the parties agree that she provided a doctor's note to the company. Her employment was terminated that day, the same day on which the application for certification was filed. Her letter of termination cites "objectionable work habits". The company states that it did not know about the union campaign at the time Ms. Kuepfer's employment was terminated. There are also a number of other assertions and allegations in the parties' material, many of which are in dispute. These are the circumstances in which the applicant union requests an interim order reinstating Ms. Kuepfer pending the hearing of the section 91 complaint.

8. Since our February 10, 1993 decision, the Board has issued reasons for decisions in *Loeb Highland*, [1993] OLRB Rep. March 197 and in *Tate Andale*, Board File No. 3438-92-M, October 13, 1993, as yet unreported [now reported at [1993] OLRB Rep. Oct. 1019]. Since those reasons were issued subsequent to our decision, we did not rely on them in any way in coming to our conclusion. However, as it happens, those reasons capture some of our thoughts in this particular case. We therefore find it a convenient way to express our views in this matter to reproduce excerpts from those decisions. In *Loeb Highland*, *supra*, the Board made these comments about interim relief:

13. Section 92.1(1) of the *Labour Relations Act* confers explicit jurisdiction on the Board to make interim orders:

92.1- (1) On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

14. The authority granted under section 92(1) is very broad, and there is no language which imposes qualifying conditions upon the Board's jurisdiction under this provision. Such extensive discretion is consistent with the Board's function as an expert tribunal on labour relations matters. It seems apparent that the Legislature was prepared to rely heavily on the Board's accumulated labour relations wisdom in determining what circumstances should attract an interim order. This is not surprising, since interim relief in labour relations matters may involve unique considerations based on a very specific social and economic landscape. In fact, it is fair to say that the interim relief jurisprudence from other provincial labour relations boards abounds with references to distinctive features of labour relations.

* * *

18. In other words, it is incumbent upon the Board to develop a sound and indigenous jurisprudence in regard to interim orders which reflects the complex and unique realities of labour relations. While we echo the views of the British Columbia Industrial Relations Council to the effect that common law principles may provide us with some useful insight, if we were to import in a wholesale or unreflective manner the kinds of tests applied by Courts in considering interim and interlocutory relief, we would be failing in our responsibility as an expert tribunal to develop a jurisprudence attuned to the distinctive features of labour relations in this province. This latter point, that our jurisprudence should reflect the realities of Ontario labour relations in particu-

lar, is also important. While we have found much that is instructive in the cases we have reviewed from other provinces, we also feel constrained to note a number of differences in the legislative or other authority which gives rise to their interim powers, in the purposes of their respective labour relations statutes and in the history and climate of their labour relations. Again, an uncritical adoption of any one of the various approaches in these cases would not serve the Ontario labour relations community well.

19. With this in mind, we turn first to the company's argument that the Board's interim relief power should be used only in rare and exceptional circumstances. We do not find this a particularly useful approach. Section 92.2(1) contains no hint that it should be reserved to extraordinary cases; indeed, unlike some corollary provisions which contain threshold tests, the Ontario provision is available in every proceeding before the Board. This is not to say that the prospect of a flood of interim relief applications does not cause us some concern. However, we think it more appropriate to start from the position of attempting to elucidate a fair and intelligent labour relations test for section 92.2(1). Those cases that meet that test should then attract interim relief, regardless of how many or how few they may be.

20. In considering the dimensions of such a test, we note that the cases from other provinces reveal an assortment of approaches and considerations in addressing interim order requests. However, there are a number of common themes running through them which may be summarized in the following manner. Most refer to some kind of threshold test in regard to the merits of the main application with reference to which interim relief is sought. Some require that a case not be frivolous or vexatious, a requirement which has also been described as the equivalent of whether there is a serious issue to be tried. Other cases have referred to whether there is an arguable case of breach, or the possibility of a legitimate claim, and a number require that there be a *prima facie* case, or that there be a strong *prima facie* case. Secondly, most cases involve a review of the harm which might befall the applicant if the interim order is not granted, and whether that harm is irreparable. Finally, the cases refer to the balance of convenience between the parties.

21. Turning first to the idea of a threshold test with respect to the merits of the main application, we have some concern about applying a high level of scrutiny to that application at the time of a request for an interim order. To the extent that such scrutiny may imply a form of prejudgement of the final disposition of the main matter, it is not particularly compatible with the scheme for interim relief set out in the Act and the Board's Rules of Procedure. More specifically, the procedure for interim relief contemplated by the Board's Rules reflects the inherent necessity for expedition in these matters. To that end, evidence is filed by way of certified declarations which are not subject to cross-examination. Indeed, section 104(14) of the Act and Rules 92 and 93 indicate the Board may not hold an oral hearing at all, but may receive the parties' arguments in writing as well.

22. This means that the Board is not in a position to make determinations based on disputed facts. In these circumstances, it would normally be unfair for an interim order to be predicated to any significant extent on a decision with respect to the strength or weakness of the main case. That should await the hearing of the main application when the Board hears oral evidence and can make decisions with respect to credibility based on the usual indicia, in a context where the parties have a full right of cross-examination. This is particularly important in cases such as the section 91 complaint to which this application relates, where decisions are often based on inferences and the various nuances of credibility play a key role. In other words, the granting of interim relief in this context should usually be based on criteria which minimize prejudging the merits of the main application.

23. Our practical concern that the Board's decisions on interim relief be insulated to some extent from the merits of the main application is reinforced by the language of section 92.1(1), which provides that an interim order can be obtained in an intended proceeding as well as in one already filed. If an interim order is available even before the main proceeding has been commenced, it suggests that interim relief is less dependent upon the main application than one might otherwise think.

24. Moreover, a number of the provisions of the *Labour Relations Act*, including some of those which the applicant alleges were breached in the complaint in this matter, are subject to a

reverse onus where a responding party must establish that it did not violate the Act. The effect is to complicate an assessment of the merits, including the issue of what would constitute a *prima facie* case in these circumstances. In addition, the interim order power contained in section 92.1 applies to an extensive package of legislative amendments, many of which involve new or reshaped jurisdiction for the Board. This means that it may be difficult to evaluate the strength of the merits of any particular case, at least until the Board has had an opportunity to develop case law in these new areas. Lastly, even where the Board can rely on well-established jurisprudence, there must be some allowance for novel arguments to be presented to it from time to time. While no tribunal encourages frivolous applications, it is also true that the Board must be responsive to changes in labour relations if its jurisprudence is to remain vital and relevant.

25. At the same time, it is clearly essential that there be some connection between interim relief and the merits of the main application. Common sense suggests that an interim order is inherently subordinate to the main application, a proposition which is given added cogency in this context by Rule 88. That rule makes it clear that a copy of the main application must be filed along with the request for an interim order, which to some extent offsets our view of the effect of section 92.1 in intended proceedings. Isolating the interim application by the absence of any requirement with respect to the strength of the main application might also carry with it the possibility of abuse, and might strand the Board in a situation where grounds for an interim order might be made out but the main application was entirely and obviously without any merit whatsoever.

26. With this in mind, we find it most appropriate to set out as one requirement in a test for interim relief that the main application must reflect an arguable case. By this we mean that if the applicant's assertions can be established, there is at least an arguable breach of the Act, or an arguable case for a remedy within the parameters of some provision of the Act. While leaving room for some innovation by parties, such a test protects the integrity of the Board's processes by precluding interim relief where the main application is frivolous or vexatious. This provides the Board with an element of security and some coherence between the main application and the interim relief power, but gives recognition to our other concerns described above.

27. We also find it more appropriate to consider this requirement as simply one ingredient in a test for interim relief, rather than an initial threshold of some kind. Setting up an assessment of the merits as a preliminary hurdle in an interim relief test suggests a two-step analysis which we find unnecessarily formal in the circumstances.

28. Returning to the themes reflected in the interim order cases from other provincial boards, the next issue is the concept of irreparable harm. This formulation is not as useful to us as it might first appear. In the first place, a review of the cases suggest that it is a rather elastic concept, which is often interpreted differently from one case to another. Secondly, the experience of this Board is not that there are two distinct categories involving cases on the one hand where entirely adequate remedies can be applied, and those on the other where the available remedies are clearly deficient. Rather, it is a more accurate reflection of the Board's experience to say that most remedies cannot cure every aspect of the harm which may flow from a breach of the Act, and that at best, the Board attempts to provide some rough approximation. Labour relations matters often involve a cluster of intangible and fluid social relations which may be extraordinarily time-sensitive. Once these relations are ruptured, they are not easily restored through the sometimes clumsy operation of subsequent remedies. Indeed, it goes without saying that remedies are, by their very nature, a substitute for what should have happened.

29. At the same time, when creatively exercised, the Board's wide remedial powers under section 91, for example, can often go a considerable distance toward repairing the mischief caused by violations of the Act. Any consideration of interim relief should also take into account the Board's experience in developing remedial orders which speak specifically to labour relations problems. Moreover, we recognize that the imposition of relief before an adjudication on the merits is inherently problematic to some extent.

30. In this context, we find it more useful to acknowledge that in terms of our ability to address harm through remedies available at the disposition of the main application, what we are really dealing with is degrees of adequacy on a continuum of damage. Attempting to force this reality

into mutually exclusive legal pigeon holes such as irreparable damage as opposed to, say, repairable damage, is more artificial than we need to be, and does not reflect the Board's practical experience.

31. If the concept of irreparable harm does not shed as much light as we would like on the test for an interim order, there is no doubt that some analysis of harm is still central. In considering the shape of that analysis, it is useful to return to the Board's own jurisprudence which emphasizes the importance of effective remedies as a critical component of the scheme of the *Labour Relations Act*. As the Board said in *Radio Shack*, [1979] OLRB Rep. Dec. 1220:

It is trite to say that all rights acquire substance only insofar as they are backed by effective remedies. Labour law presents no exception to this proposition. An administrative tribunal with a substantial volume of litigation before it faces a great temptation to develop "boiler plate" remedies which are easy to apply and administer in all cases. This temptation must be resisted if effective remedies are to buttress important statutory rights. An important strength of administrative tribunals is their sensitivity to the real forces at play beneath the legal issues brought before them and there is no greater challenge to the application of this expertise than in the area of developing remedies. To be effective, remedies should be equitable; they should take account of the economics and psychology permeating the situation at issue; and they should attempt to take into account the reasons for the statutory violation.

32. Moreover, both the Board and the Courts have long recognized that delay poses special problems in labour relations matters. In *Consolidated-Bathurst Packaging Ltd. v. I.W.C., Local 2-69* (1984) 2 O.A.C. 277, the Court noted:

... there is a fundamental principle of labour law that injustice and detriment to the labour relations of an employer and employee will result if the process is delayed. In my opinion, it is fair to say that the thrust of jurisprudence not only in the Board but in the courts may be summarized by saying:

In the law which has grown up around labour relations in this province and indeed elsewhere where the common law is pursued, the overriding principle invariably applied is that labour relations delayed are labour relations defeated and denied: *The Journal Publishing Company of Ottawa Ltd. v. The Ottawa Newspaper Guild*, Ont. C.A. released May 17/77 (unreported) [since reported [1977] 1 A.C.W.S. 817 (Ont. C.A.)].

Similarly, in *Re United Headwear and Biltmore/Stetson (Canada) Inc.* (1983), 41 O.R. (2d) 287, the Court commented that delay in labour relations matters often works unfairness and hardship. To some extent then, the Board must ensure that delay does not in itself decide a case.

33. The importance of effective remedies, their general imperfection in labour relations, and the corrosive effects of delay all serve to highlight the critical role interim relief has to play in this area. If harm is not easily cured after the fact, and if delay is critical, it makes some sense to emphasize preventing that harm at the earliest possible point. However, it must be recognized that preventing one harm, to a union applicant for example, may well have a harmful labour relations effect on a responding employer. This suggests that a general predisposition towards preventing harm, rather than curing it, applies to the interests of both parties. In other words, the Board must balance the harm to each party in considering whether to grant an interim order. As a result, rather than separating out the concept of irreparable harm which appears to be a poor fit with the Board's experience in remedial matters, and then proceeding to an examination of the balance of convenience, we find it more consonant with labour relations realities to adopt an approach where we consider both what harm may occur if an interim order is not granted, and what harm may occur if it is. This does not mean that the notion of irreparable harm is entirely irrelevant. It merely reduces it to one of a number of aspects of harm which the Board might consider in this area.

34. Of course, this leaves open to some extent the sort of harm we envision as relevant to this balancing process. Given the fact that this jurisprudence is in its infancy, it makes sense to allow the parameters of that harm to evolve in the context of concrete situations which will be pre-

sented to us. Suffice it to say at this point that balancing the harm to the parties is not an exercise which takes place in a vacuum, but rather in the context of the purposes and scheme of the Act, which also serve to provide definition for the type of harm we would find persuasive. It is also worth noting that the Board has more flexibility in crafting interim orders than it may in final remedies. Because they are temporary, and because they are not dependent on a finding of a violation, for example, the Board has the relative luxury to conceive of interim justice as an endeavour in problem-solving, rather than fault-finding.

In *Tate Andale, supra*, the Board made these observations:

37. Nevertheless, we think it is fair to conclude that section 92.1 was intended to be an *addition* to the Board's remedial arsenal. It was intended to supplement the Board's existing labour relations "remedies" available at the end of a case, so that what the Board must now do, is square its new powers with the established legal framework. Moreover, interim relief is clearly derivative. It does not stand alone. It draws its essence, and must be tailored, to the particular mix of facts in each case, as well as the public and private interests at play in the main application. The main application sets the framework for consideration of the particular facts under review, and the particular interim "order" or "relief" requested.

38. Since that is the starting point for any interpretation of section 92.1, it may be useful for this case to briefly consider the way in which the Board approaches the litigation and resolution of unfair labour practice complaints filed in connection with an organizing campaign.

39. In the first place, we might observe that the Board is not a court; and there is no reason to expect that either its adjudicative or remedial approach should mirror that of a court. Civil practice may sometimes provide a useful analogy, but when the Act so clearly involves policy considerations, so systematically modifies common-law premises, and so clearly excludes judicial involvement (see section 110), it would be curious for the Board to make common-law criteria a governing principle of interpretation. This is not to say that the Board's approach to dispute resolution will never resemble that of the courts; however, the criteria applied, and the result reached, are more likely to be based upon the scheme and purpose of the Act, the Board's own experience, and the norms and needs of the industrial relations community. (See generally: *Alex Tomko v. Labour Relations Board of Nova Scotia, et al* (1975) 76 CLLC ¶14005 (per Laskin, C.J.C.).)

* * *

41. In our opinion, these "remedial" considerations traditionally reviewed at the end of the case should inform the way in which the Board approaches interim orders or "relief". In both instances, the Board is required to blend and balance statutory imperatives, policy considerations, and the realities of contemporary labour relations.

42. Where interim relief is sought in connection with an unfair labour practice complaint, one must keep in mind the legal rights and administrative processes that the law is intended to protect; or to put the matter another way, the rights and processes which the impugned conduct may (and may be intended to) undermine. In the context of a union organizing campaign, those rights include not only an *individual* right to choose without fear of reprisal, but also a correlative *group* right of self-organization, so that employees may establish a collective bargaining relationship in the manner contemplated by the statute. A remedial philosophy that focuses exclusively on repairing the harm to individual victims, and neglects the general assault on freedom of association, will inevitably fail to promote the statutory objective.

43. If the employer's purpose were only to punish the individual worker for supporting the union, the law might well redress the harm by restoring him/her to the job, and making up the income that s/he has lost. But if the real objective is to break the momentum of the organizing campaign, to eliminate an influential employee advocate, or to send a graphic message to other employees, the set-back to the employees' quest for a collective voice in the workplace may not be so readily remedied.

44. It is not easy to calculate the value of the employees' "lost opportunity" to make a fair and free choice about trade union representation. It is not easy to repair an administrative process

that depends for its efficacy on the free exercise of employee wishes. It is not easy to assess the value of lost leadership in the formative stages of an organization - although it is perhaps self-evident that a voluntary organization, be it a club, church or trade union, depends upon the zeal and commitment of its core members. However intangible these qualities of energy or commitment may be, a voluntary organization like a trade union cannot form or function without them - particularly in its early stages when workers may be unfamiliar with their rights, when the statutory freeze or "just cause protection" may not yet have been triggered (see sections 81 and 81.2 of the Act) and employers may be more inclined to resist unionization, legally or illegally. For it is a sad fact of the industrial relations scene that almost fifty years after the employees' right to collective bargaining was entrenched in law, some employers continue to resist the exercise of those rights, or penalize employees who dare to do so. That is why section 111 of the Act preserves the anonymity of union supporters, lest their identification expose them to employer reprisals. If the Legislature had been confident that employees had nothing to fear, or Board remedies were a complete answer to illegality, it would not have shrouded the organizing process with such secrecy (incidentally reversing, by statute, the decision of the Supreme Court of Canada in *Globe Printing Co.* [1953] 3 DLR 561).

45. A remedial approach that does not take into account these labour relations realities will necessarily be deficient, and to that extent ineffective, as either redress or deterrent.

46. Where the Board concludes that a breach of the Act has occurred, it is required to construct a *remedy* that is sensitive to these concerns and, insofar as possible, rectifies the labour relations status quo disrupted by the illegal act. Where the Board is called upon to grant *interim relief* in a "pending or intended proceeding", it must consider whether an affirmative order is necessary either to neutralize the potential impact of an *alleged* unfair labour practice, or to enhance the Board's ability to address the labour relations situation, whether or not an unfair labour practice has occurred.

47. It must be recognized that early intervention, stressing immediacy rather than severity, can have a powerful preventive effect and reduce the necessity for later more intrusive action. Whatever balance may commend itself in particular cases, self ordering is preferable to Board intervention, and an early, moderate response may encourage accommodation and may be preferable to a later, more intrusive one. It is in no one's interest to encourage layers of litigation. If timely interim relief offsets the potential advantage of illegal action, discourages such action, promotes settlement or reduces the likelihood of further litigation, such results are all completely consistent with the statutory objective.

48. It is essential that Board orders - interim or final - be sensitive to the realities of the workplace; and one such reality is the employee's ignorance of the law. One cannot realistically expect rank and file employees to be familiar with their rights under the *Labour Relations Act*. But one can be sensitive to their fears, and responsive to the concern that the law may favour those with economic power or the ability to act unilaterally. Accordingly, quite apart from the relief available to aggrieved individuals, there may be an independent value in an order that reassures other workers that the law stands above the fray, and proclaims that the legal result will rest on statutory principles, not the personality or relative power of the participants. In our system of industrial relations there is ample scope for the exercise of economic power, but it is not, and cannot be, the basis for resolving statutory rights.

49. As the Board noted in *Radio Shack*, and we here repeat: a remedial order (be it interim or final) can, and often should, include an informational component - not least because the discharge of union supporters in the midst of an organizing campaign may have an adverse impact *regardless of the propriety of such discharge*. An employer's actions may inhibit the exercise of employee rights, *whether or not it intends to do so*; and may undermine the mechanism for testing employee wishes, whether or not there is ultimately a finding of illegality. Again, timely intervention, without finding of fault, may be the most appropriate course in such circumstances, in order to promote the statutory policy, and protect the established administrative processes.

50. On a motion for interim relief, it is neither necessary nor desirable for the Board to make any determination of the merits of the underlying application (here an unfair labour practice complaint with a certification application in the wings). The Act and Rules both contemplate a

summary process, based upon written material, where there may not even be a formal hearing (see section 104(14) and Rules 92 and 93). Within that framework, it is neither fair nor feasible to try to resolve disputed facts or explore the nuances of the law. That is best left to the hearing "on the merits", where the Board will have to hear directly from witnesses whose credibility could be an issue, and the parties will have more flexibility to develop their case in their own way.

51. Of course, under section 92.1, the Board will have to take into account the kind of case it has before it, what we have described as the "contours" of the case (including disputed facts), and the likely disposition should one party or the other be successful. But, on an application for interim relief the focus is on preserving rights pending the hearing on the merits, rather than a meticulous assessment of the relative strength of each party's case. Accordingly, a party may be entitled to an interim order or interim relief if the material filed establishes an "arguable" or *prima facie* case for the ultimate relief requested.

9. This brings us to the facts before us. We observe firstly that there is little doubt that there is an arguable breach of the Act on the face of the section 91 complaint. If the applicant's allegations were proven, they would amount to violations of section 65, 67 and 71 of the *Labour Relations Act*.

10. Moving on to the specific balance of harm in this case, the Board has frequently recorded the chilling effects of a discharge of a union organizer on an organizing campaign. Again, we find it convenient to use portions of *Loeb Highland, supra*, to summarize our own views about this particular matter:

36. Moving on to the specific balance of harm in this case, the Board has frequently recorded the chilling effects of a discharge of a union organizer on an organizing campaign. For example, in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254, the Board said as follows:

However, the impact of unfair labour practices are seldom confined to an economic impact. For example, the isolated dismissal of an employee in the midst of or at the outset of an organizing campaign is likely to have a significant "chilling effect" on other employees who witness the incident and understand its origin. The dismissal of a fellow employee for union activity conveys a strong warning to other employees and can bring a stop to an ongoing drive in its tracks. The mere reinstatement of the employee directly affected, with back-pay some time later, may do little to assure his or her fellow employees that the employer is prepared to live within the requirements of the statute and that effective remedies exist of those occasions where he will not.

37. Moreover, the Board has found on quite a number of occasions that the discharge of a union organizer during a union campaign may lead to a situation where the true wishes of employees can no longer be ascertained, despite the Board's ability to reinstate the organizer. In other words, the intimidatory effect is so powerful that employees can no longer express their real views on unionization, with the result that certification is granted without a test of employee wishes. For example, in *DI-AL Construction Limited*, [1983] OLRB Rep. Mar. 356, the Board said in this regard:

A discharge is one of the most flagrant means by which an employer can hope to dissuade his employees from selecting a trade union as their bargaining agent. The respondent's action in discharging Mr. Holland because of his support for the union would have made clear to employees the depth of the respondent's opposition to the union and likely have created concerns among them that if they were also to support the union, it might jeopardize their own employment. In the face of the discharge I doubt that the employees would now be able to freely decide for or against trade union representation. This is particularly so given the small size of the bargaining unit and the respondent's earlier conduct. In these circumstances, I am satisfied that because of the respondent's unlawful conduct, the current true wishes of the employees are not likely to be ascertained in a representation vote.

38. Similarly, in *Zenith Wood Turners Inc.*, [1987] OLRB Rep. Nov. 1443, the Board was faced with a situation where a company had laid off a number of employees during an organizing campaign in violation of the *Labour Relations Act*. In this case, however, the company recalled the employees shortly thereafter and issued a letter indicating that employees were free to chose union representation or not. The Board found that the damage had already been done, despite the recall and letter, and that employees were no longer able to express their true wishes with respect to union representation. The Board came to a similar conclusion in *Elbertsen Industries Limited*, [1984] OLRB Rep. Nov. 1564, despite the reinstatement of an employee laid off in violation of the Act, although there were other factors which resulted in that finding as well.

39. Why is the impact so severe when a union organizer is discharged? The Board has previously commented on the peculiar vulnerability of employees who depend on the employer for their livelihood. In *Pigott Motors (1961) Ltd.* (1962), 63 CLLC ¶16,264, the Board said:

There are certain facts of labour-management relations which this Board has, as a result of its experience in such matters, been compelled to take cognizance. One of these facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act.

In *Roytec Vinyl Co.*, [1990] OLRB Rep. June 727, the Board commented on this problem in another context:

In the Board's experience, employees are often concerned that they may be subject to such reprisals by their employer for union activity. The Board's jurisprudence is replete with examples of employees who were discharged or penalized in some way, at least in part, because of their support for unionization. For an employee who fears that joining a union will lead to a discharge or other penalty, the result he or she contemplates can be a loss of economic security, the loss of the social milieu of the workplace, a concomitant loss of self-esteem, identity or social standing, the uncertainty of finding another job and the possibility of a slide onto social benefits. Of course, in most cases such a bleak picture will not come to pass; nevertheless, the mere possibility of any of these consequences may exert a powerful influence on an employee contemplating collective bargaining, a regime frequently not welcomed by employers.

For similar reasons, a discharge has been referred to in arbitral jurisprudence as the "capital punishment" of labour relations.

40. The combination of the economic vulnerability of employees and their assumption that an employer does not welcome a union means that a union organizing drive is a relatively fragile enterprise in which momentum is often critical. Where a campaign is disrupted by an unlawful discharge, the Board's jurisprudence under section 9.2 of the Act reflects the fact that such momentum cannot easily be restored by the reinstatement of an employee at some point farther down the road.

41. This raises the question of whether even interim reinstatement can prevent this kind of harm. We have no illusions that the powerful effect of a discharge in these circumstances can be entirely counteracted by earlier measures. Nonetheless, common sense suggests that early reinstatement can at least help to minimize some of the potential harm to an organizing campaign.

11. Among other things, the company argued that since the application for certification had already been filed, the campaign was over since no more membership evidence could be submitted at this point. As a result, either the potential harm to the union or the benefit of an interim order was minimized. Although it was not known to the parties whether or not there would be a vote directed by the Board on the certification application, the company argued that we should require

the union to tell us how many cards it had filed, and draw conclusions from this as to whether a vote would be directed. Even if a vote was ordered, counsel argued, it would be a secret ballot vote so that employees would be free to express their views, and there were two other employee organizers who could still electioneer, although he acknowledged that one was currently on Worker's Compensation benefits. He also noted that Ms. Kuepfer could still electioneer as well, albeit from outside the plant.

12. Counsel for the union submitted that there was still the possibility that the Board might direct a vote on the certification application, and as a result, the chilling effect of the discharge was still critical and the union needed to have Ms. Kuepfer back in the plant to maintain and build support in this regard. In his view, the fact that any vote would be conducted by secret ballot would not be sufficient to counteract the climate of fear that a discharge creates, and he referred to the Board's jurisprudence with respect to section 9.2. In terms of the possibility of a vote, counsel pointed out that a group of employees opposing the union had filed material late in the certification application, and might seek to intervene. (A lawyer representing those employees was present in the room during the argument on the interim order but did not attempt to formally appear.) While the union knew how many cards it filed, it did not know, for example, how many were valid and whether the Board was conducting an investigation into any of them. Having Ms. Kuepfer electioneer from outside the plant, counsel argued, would only highlight the fact to other employees that she was no longer working there. Even if there were no vote, the union would be entering a sensitive period after certification where it had not yet had a chance to establish that collective bargaining could yield some benefit to employees and the potential harm of the discharge would still be felt.

13. We accept that a discharge perceived by employees as a reprisal for union activity can cause considerable damage throughout the process of organizing employees, obtaining certification and embarking on a collective bargaining relationship. Before the application for certification is filed, it may halt or slow recruitment of employees to membership. After the application is filed, it may dry up sources of information necessary to pursue the application, scare off potential witnesses, and influence the results of a representation vote. As the Board noted in the context of interim certifications in *City of Mississauga Public Library Board*, [1976] OLRB Rep. Feb. 1, even the period after the union has established the required membership support is one of high expectations and uncertainty. Similarly, during the post-certification period employees may be too intimidated to help formulate bargaining proposals, serve on a negotiating team or identify themselves with the union in other ways. If the application for certification is unsuccessful, such a discharge may kill any further organizing. Even after a first collective agreement is signed, a union needs to mobilize and maintain employee support as employees are required to serve as stewards, sit on committees and participate in a myriad of activities necessary to administer the collective agreement and keep the relationship viable. It is for these reasons that the Board has considered the chilling effect of discharges even during the term of a collective agreement and has ordered postings to counteract that effect (*Valdi Inc.*, [1980] OLRB Rep. Aug. 1254 and *Silknit Limited*, [1983] OLRB Rep. Aug. 1362).

14. At the same time, the situation becomes progressively less fragile as different watermarks in this process are attained. If the union has filed membership evidence for over 55% of employees, and there are no other difficulties in the case, the union may be certified without a vote. In these cases, it may be in a less vulnerable position after the application for certification has been filed. Once the application has been disposed of and if the union is certified, a breathing space has been secured, and the kind of momentum which characterizes an organizing campaign becomes less critical. And after the first collective agreement is signed, it is normally anticipated that the situation will stabilize even further.

15. Obviously the stage at which an interim order is requested may be one of many relevant considerations in the Board's decision. However, we find our own thinking in this regard is aptly summarized in these remarks of the Board in *Tate Andale, supra*:

56. What is the "harm" potentially suffered by the union, the employees, and the process, if interim relief is not granted - that is, if the Board does not reinstate the grievors, or otherwise take steps to restore the labour relations status quo prevailing at the time of their discharge? Least significant, we think, is the potential wage loss to the aggrieved employees, which is fully recoverable (if they are successful) within a few weeks, and, in Sweetman's case, is moderated by the fact that he has already received some severance pay. More important, in our view, is the likely impact on other employees, who may have had an appetite for collective bargaining, but have just seen the union's two principal proponents summarily removed from the workplace in the midst of the organizing campaign. This is not a neutral event, and it would be totally unrealistic to expect employees to regard it that way.

57. It is one thing for lawyers to be confident in the efficacy of the legal process to vindicate statutory rights. It is quite another to expect employees to have such confidence, or to still the nagging suspicion that relative economic power might influence the result. Nor is this idle speculation, for even among sophisticated labour law practitioners there is an ongoing debate about the utility of Board remedies, and since the early 1970's the Statute has been amended on several occasions to broaden the remedial options - suggesting, we think, some Legislative doubts about the effectiveness of what was there before. And unless the Board does so, there may be no authoritative voice to reassure employees of their statutory right to join a union, or not, free from improper interference.

58. For most employees, the law is an unfamiliar, even alien abstraction. The reality is the employer's economic power and the "right" (or at least opportunity) to move unilaterally to deprive them of their livelihood. Accordingly, the most effective way to counteract the "message" of a summary discharge is an equally speedy reinstatement - *accompanied by formal notification to employees of the terms and limits of such temporary reinstatement, as well as a summary of their statutory rights*, in order (to use the words of the panel in *Radio Shack*) to "take account of the economics and psychology permeating the situation at issue". Indeed, in the context of an organizing campaign, where the certification application has not yet been disposed of, that Board response is particularly attractive, unless there are compelling employer interests that point in some other direction. During this sensitive period, labour relations realities commend this prophylactic approach.

(emphasis original)

16. In this particular case, the application for certification has not yet been determined. In these circumstances, the fact that an application has been filed does not provide us with much reassurance in terms of the kind of chilling effect which may be created by Ms. Kuepfer's discharge, and we are not inclined to place much weight upon it.

17. Looking at the situation as a whole, we conclude that the potential harm of not granting the interim order is still significant. This brings us to a consideration of the harm that may result from granting the order. The company asserts in its various declarations that Ms. Kuepfer has been rude and used abusive language to Ms. Welch, and that if Ms. Kuepfer is reinstated, it will be extremely disruptive, chaos will result and Ms. Welch may quit. It is not in dispute that Ms. Welch and Ms. Kuepfer no longer work in the same area of the plant, but the company asserts that they may have to pass each other in the lunchroom and on their way to and from their respective work areas.

18. We accept that the relationship between Ms. Kuepfer and Ms. Welch is a difficult one at this point in time. Nevertheless, the fact that they are no longer working together will help to minimize their contact, and it seems somewhat unlikely that chaos will result in these circumstances. In arriving at our conclusion in this regard, we were cognizant of the fact that the section

91 complaint had been expedited under section 92.2 with the effect that the hearing into the merits of the complaint was scheduled to commence within two weeks.

19. As a result, we concluded that the harm which might stem from granting the interim order requested was less than the harm which might occur if it was not granted, and we issued the order set out above.

DECISION OF BOARD MEMBER J. A. RUNDLE; March 9, 1994

1. I dissent.

2. While the applicant may be able to establish an arguable case in this instant, I think an analysis of the resulting harm clearly favours the dismissal of the application.

3. Turning first to the harm likely to be suffered by the union, I would dispute the finding of my colleagues. Although a dismissal may have a chilling effect on an organizing campaign, I think that such an effect is far less significant where the application for certification has already been filed. Once the application is filed, the focal point of the campaign is, for all intents and purposes, over. Moreover, membership evidence would have already been collected and thus employee preferences have been determined. I would also agree with counsel for the employer who argued that while the certification had not yet been determined, even if it were put to a vote, the ballots would be secret and employees would be free to express their views. It would seem to me that the harm to the union in denying this application is minimal.

4. In contrast, the issuing of an interim order would be a heavy burden to the employer. Reinstatement of Ms. Kuepfer would undoubtedly cause a substantial disruption in the workplace. Not only would the employer's authority be undermined in terms of its ability to discipline other employees in the workplace, but the reinstatement of Ms. Kuepfer would ultimately serve only to cause serious labour relations harm.

5. Finally, I think that both *Loeb Highland*, [1993] OLRB Rep. March 197 and *Tate Andale*, [1993] OLRB Rep. Oct. 1019 are distinguishable from this case on the basis of timing of the dismissals. The grievors in *Loeb Highland*, *supra* and *Tate Andale*, *supra* were dismissed during the organizing campaign, but prior to the filing of the application. However, as mentioned above, the grievor in this instance was dismissed after the application had been filed - a difference which I would find to be significant.

6. For all of the above reasons I would dismiss the application.

1981-93-R Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880, Applicant v. Corporation of the Town of Bothwell, Responding Party

Certification - Bargaining Unit - Employee - Deputy Treasurer and Works Supervisor employed by municipality found to be 'employees' within meaning of Act and included in bargaining unit - Certificate issuing

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *G. O. Shamanski* and *P. V. Grasso*.

DECISION OF THE BOARD; March 25, 1994

1. This is an application for certification. Pursuant to an earlier decision of the Board dated October 5, 1993, a Labour Relations Officer was appointed to inquire into and to report to the Board with respect to three individuals who the responding party states are not "employees" for the purpose of the *Labour Relations Act*. Prior to the examinations scheduled by the Board, the parties agreed that Greg St. Pierre, a cemetery worker, was not an employee of the responding party for the purpose of the Act.

2. It is the position of the responding party that Pat Broad, Deputy Treasurer, is employed by the responding party in a confidential capacity in matters related to labour relations so as to exclude her from the bargaining unit, and that William McRoberts, Works Supervisor, exercises managerial functions so as to exclude him from the bargaining unit. The applicant takes the position that both individuals are employees for the purposes of the Act and should be included in the bargaining unit.

3. A Labour Relations Officer convened a meeting of the parties and heard evidence with respect to this issue. A transcript was prepared and provided to the parties following which written submissions were filed with the Board by both parties. Neither party requested an oral hearing. The Board has reviewed the transcript and fully considered the submissions of the parties in coming to its decision.

4. We propose first to set out the principles that we have taken into consideration in reaching our conclusions, and then to review the evidence. Section 1(3) of the Act provides as follows:

1.- . . .

(3) For the purposes of this Act, no person shall be deemed to be an employee who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

It is apparent from the reading of section 1(3) of the Act that there are two grounds upon which individuals can be excluded from collective bargaining. Should an individual exercise managerial functions he will be so excluded. The individual must make independent decisions on important matters of policy or the running of the organization or make effective recommendations on matters having a direct impact on terms and conditions of employment. Alternatively, should the individual have regular and material involvement in matters which impact upon collective agreement negotiations or the employer's collective bargaining strategy, the confidential exclusion will apply. The underlying basis for these two exclusions is not difficult to discern - it is important to ensure that those individuals who have managerial or confidential duties remain free of any conflicting interest which may influence them in the proper and faithful execution of their duties.

5. In the *Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121, the Board made the following observations regarding “first line” managerial employees:

3. *The Labour Relations Act* does not contain a definition of the term “managerial function”, nor are there any specified criteria to guide the Board in reaching its opinion. The task of developing such criteria has fallen to the Board itself, and in recognition of the fact that the exercise of managerial functions can assume different forms in different work settings, the Board has, over the years, evolved various general approaches to assist it in its inquiry. In the case of so called “first line” managerial employees, the important question is the extent to which they make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit. In the case of more senior managerial personnel whose decision-making may have a less direct or immediate impact on bargaining unit employees, the Board has focused on the degree of independent decision-making authority over important aspects of the employer’s business. It is evident that persons making significant executive or business decisions should be considered a part of the “management team” even though they do not exercise the kind of direct authority over employees which is characteristic of a first line foreman.

4. The line between “employee” and “management” is often shaded, and while it is helpful to consider the principles articulated by the Board in previous cases, ultimately the determination must turn on the facts of the particular case. There is no litmus test which is universally applicable and dictates the result in every situation, and in assessing each case, the Board must have due regard to the nature of the industry, the nature of the particular business, and individual employer’s organizational scheme. There must, of course, be a rational relationship between the number of superiors and subordinates, consultation or “input” should not be confused with decision-making, and neither technical expertise nor the importance of an employee’s function can be automatically equated with managerial status. On the other hand, there may be individuals whose nominal authority appears to be limited, and who have no formal managerial position or title, but who nevertheless make recommendations affecting the economic destiny of their fellow employees which are so frequently forthcoming, and consistently followed by superiors, that it can be said that, in fact, the effective decision is made by the challenged individual. It is this type of recommendation which the Board has characterized as an “effective recommendation” and the inclusion of these persons in the bargaining unit would raise the very kind of conflict of interest which section 1(3)(b) was designed to avoid. Persons making “effective recommendations” of this kind are regarded as part of the “management team”, and are excluded from the bargaining unit.

5. In each instance, the Board seeks to determine the nature and extent of the individual’s authority as well as the extent to which that authority is actually exercised. It is not sufficient if an individual has only “paper powers” contained in a job description or a “managerial” job title, if managerial functions are not actually exercised. Even the performance of certain co-ordinating functions may not be determinative. Where numbers of people work at a common enterprise (especially in the white collar - service sector) many persons may be engaged in co-ordinating activities which are largely routine, carried out within a pre-established framework of rules and policies, and subject to real managerial authority which is actually exercised from above. In addition, persons who perform technical functions or exercise craft skills which have been acquired through years of training and experience, will necessarily have a considerable influence over unskilled employees or less experienced “journeymen” or technicians. These experienced personnel will commonly supervise the work of those who are less experienced, and it is part of their normal job function to train and direct such persons and to instill good work habits. Often, it is only the most senior or skilled employees who will fully understand the technical requirements of the job and the tools and material required, and accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. In such circumstances, it is inevitable that they will have a special place on the “team” and will have a role to play in co-ordinating and directing the work of other employees; but this does not mean that they exercise managerial functions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective

bargaining - especially when most of their time is spent performing functions similar to those of other individuals in the bargaining unit and there is little or no evidence of the kind of conflict which section 1(3)(b) is designed to avoid. The situation of persons who exercise some degree of control over others, but who also perform bargaining unit work was discussed by the Board in *Falconbridge Nickel Mines Limited* [1966] OLRB Rep. Sept. 379, as follows:

Most of the persons in dispute have more than one function and generally speaking it is the weight or emphasis attached to the different functions which must determine on which side of the managerial line the persons fall. Senior or skilled employees often have more responsibilities than other rank and file employees and they exercise certain control and direction over the other employees because of their greater experience and skill. It is the Board's difficult task to determine whether the additional responsibilities are managerial functions within the meaning of section 1(3)(b) of the Act or are merely incidental to the prime purpose for which the employee is engaged (i.e., to perform work properly performed by persons within the bargaining unit). If the majority of a person's time is occupied by work similar to that performed by employees within the bargaining unit and such person has no effective control or authority over the employees in the bargaining unit but is merely a conduit carrying orders or instructions from management to the employees, the person cannot be said to exercise managerial functions within the meaning of section 1(3)(b) of the Act. On the other hand, if a person is primarily engaged in supervision and direction of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank and file employees when an emergency arises or to relieve an employee during occasional periods of absence or even to perform a particularly important job requiring special skill and experience, such occasional work in no way derogates from his prime function as a person employed in a managerial capacity. When assessing a person's duties and responsibilities the Board does not look at any one function in isolation but views all functions in their entirety. As stated in the *McDougall Case* above referred to, titles alone are not much assistance in determining what a person's functions really are ...

The cases cited above would seem to indicate that while a person may have minor supervisory function or very limited confidential function in matters relating to labour relations, if such functions are merely incidental to their main function and are of such a nature that they cannot be said to materially effect the employment relationship of the respondent's employees, such persons should not be excluded from collective bargaining by reason of section 1(3)(b) of the Act. Unless a person who regularly performs work similar to persons in a bargaining unit has independent discretionary powers rather than merely incidental reporting functions which are subject to the discretion and authority of higher persons in management, there is no reason to exclude such a person from collective bargaining.

In other words, in determining an individual's status, one cannot look at a portion of his duties in isolation. If the functions of an allegedly "managerial" character occupy only a minor part of his time, it is unlikely that he will be excluded from the ambit of collective bargaining unless those functions involve a decisive impact on his fellow employees. (For example, a unilateral decision to fire an employee would be highly significant, even if the exercise of such power is infrequent; while incidental supervisory responsibilities do not raise the kind of conflict of interest underlying section 1(3)(b).

We agree with the Board's observations in that decision.

6. Similarly, the Board made the following observations (with which we also agree) regarding the "confidential" exclusion in *Kitchener Waterloo Hospital*, [1986] OLRB Rep. May 651.

4. The second branch of section 1(3)(b) has a similar collective bargaining purpose: to exclude from a bargaining unit persons who have access to confidential material relating to labour relations, so that the employer can know that its internal strategies and communications are known

and handled exclusively by persons of undivided loyalty (see *Town of Gananoque*, [1981] OLRB Rep. July 1010). Access to information which may be "confidential" is not, by itself, sufficient to exclude an employee from the application of the Act since what is important is not the confidentiality of the information, but rather its labour relations content and potential collective bargaining use. For example, the secretary to the industrial relations manager may have no independent managerial authority, but may still be privy to the employer's collective bargaining strategy or other sensitive labour relations information. At its most prosaic level, even a clerk or a stenographer who takes minutes at a management meeting to plan the employer's collective bargaining posture should not be faced with a potential conflict of loyalty because of his/her membership in the bargaining unit. However, as the Board indicated in *York University*, [1975] OLRB Rep. Dec. 945:

...the Board must be satisfied of "a regular, material involvement in matters relating to labour relations" to justify a finding excluding a person from operation of the Act. (See, *The Falconbridge Nickel Mines Ltd.* case, [1969] OLRB Rep. September 379). Mere access to confidential information that may pertain to labour relations, standing alone, is no reason for excluding employees from the bargaining unit. (*The Metropolitan Separate School Board* case, [1974] OLRB Rep. Apr. 220). Nor is mere knowledge of matters that may be deemed "confidential" in the sense that the employer would not approve of the disclosure of such information by his employees sufficient to justify a positive finding under section 1(3)(b). (See *The Comtech Group Limited* case, [1974] OLRB Rep. May 291) The important test is whether there is a consistent exposure to confidential information on matters relating to labour relations so as to constitute such exposure an integral part of the employee's service to the employer's enterprise. (See *The Toledo Scale Division of Reliance Electric Limited* case, [1974] OLRB Rep. June 406).

7. With the above principles in mind, we consider the two individuals in question before us.

Pat Broad

8. Ms. Pat Broad is the Deputy Treasurer of the Town of Bothwell. A review of the transcript discloses few if any facts that would suggest that she be excluded from collective bargaining. Employer's counsel focused his concerns on the fact that the Clerk-Treasurer of the Town, who is excluded from the unit, works a 4-day week and that it is the responsibility of Ms. Broad to act in his place when he is absent. Counsel submitted that Ms. Broad, as a practical matter, could not leave "management issues" for the return of the Clerk-Treasurer and therefore should as a matter of principle be excluded from collective bargaining.

9. The Board does not agree. The transcript of the examination of Ms. Broad discloses no involvement in any matters relating to labour relations. She was unaware of whether the Town kept personnel records on its employees. There is no suggestion in the evidence that Ms. Broad participates in any way with respect to strategic decisions relating to employment matters - she does not hire, screen or interview potential employees, nor does she participate in personnel discussions at a strategic level. Ms. Broad's only connection to employment matters is in her role as the person who prepares payroll and remittance documentation. These documents are kept in her office and are hardly the type of documentation to which the "confidential exclusion" is intended to refer.

10. It is true that Ms. Broad acts as Clerk-Treasurer in the absence of the Clerk-Treasurer once per week. This is not something which, in any way, affects Ms. Broad's access to confidential labour relations information. The transcript of the examination makes it quite clear that Ms. Broad does not assume any of the Clerk-Treasurer's duties relating to employment matters when the Clerk-Treasurer is absent. As a result, there is no evidence to suggest that Ms. Broad ought to be

excluded from the bargaining unit. The Board finds that Ms. Broad is an employee for the purposes of the Act.

William McRoberts

11. Mr. William McRoberts is the Working Public Works Supervisor of the Town of Bothwell. The responding party urges exclusion of Mr. McRoberts on the grounds that he has the effective power to hire and fire other employees, schedules and assigns work, evaluates, instructs and directs his Assistant in all matters. Counsel focuses as well on Mr. McRoberts' budget involvement and his involvement in long term planning. Counsel urges the Board to keep in mind that the transcript discloses that Mr. McRoberts is a "co-operative", rather than "autocratic" supervisor, which may explain a lack of disciplinary or discharge involvement by Mr. McRoberts.

12. Once again, the Board does not agree with the conclusion submitted by the employer. As noted in *Corporation of the City of Thunder Bay, supra*, the important question in cases of first line managerial employees is the extent to which they make decisions which affect the economic lives of their fellow employees. It is clear from the transcript of Mr. McRoberts' examination that he does not have the ability to hire, promote, demote, or grant wage increases to his Assistant - these are all functions which are retained by Town Council. It is true that Mr. McRoberts had, at one time, the ability, which he exercised, to hire "fill ins" should his Assistant be absent for any particular reason. However, since his current Assistant has been employed by the Town no such part-time or casual employees have been hired by Mr. McRoberts. The decision to hire his current Assistant, and the number of hours that he works, were both made by Town Council, with input by Mr. McRoberts. It is significant that Mr. McRoberts recommended a 40-hour week for his Assistant and that Town Council decided to permit only a 24-hour week. No explanation for the non-acceptance of his recommendation was given to Mr. McRoberts.

13. Mr. McRoberts has never been faced with a disciplinary situation. He speculated that, should he be put in a situation which required discipline, he would "log" his observations and attend before Town Council for guidance as to what steps to take. Mr. McRoberts felt that in such circumstances he may well be asked for an opinion or a recommendation by Town Council. In our view, it is difficult to reach any conclusion as to what would occur in this situation, as the Town Council has, on other matters, not adopted Mr. McRoberts' recommendations and implemented them. We can only conclude that the evidence does not establish, on a balance of probabilities, that any recommendations made by Mr. McRoberts would be adopted by Town Council so regularly as to characterize them as "effective recommendations".

14. With respect to policy formulation, the evidence before the Board indicates that Mr. McRoberts has no real function in that regard. He is involved in some long range planning for the Town in his area of expertise, but this is in conjunction with Town Council. On a day-to-day basis, Mr. McRoberts has discretion only to make routine decisions, such as arranging for salt and sand purchases. More significant investment decisions - such as the purchase of new machinery - is left to Town Council, though Mr. McRoberts is one individual who would be sought out for an opinion in that case.

15. Finally, it is evident from the transcript of testimony that Mr. McRoberts spends a great deal of his work week performing "hands on" work such as that performed by his Assistant. Although Mr. McRoberts does have scheduling responsibilities (the schedule seems to be set on a consultative basis with his Assistant) and other minor supervisory powers, these responsibilities are easily outweighed by the lack of managerial functions which is otherwise indicated by his daily routine. Accordingly, we are of the view that Mr. McRoberts is an employee for the purposes of the Act and ought to be included in the bargaining unit.

16. The Board finds, therefore, that the appropriate bargaining unit is:
- all employees of the Corporation of the Town of Bothwell in the Town of Bothwell, save and except Clerk-Treasurer and persons above the rank of Clerk-Treasurer.
17. In accordance with the Rules of Procedure respecting applications for certification, the employer has filed a list of employees in the bargaining unit, together with sample signatures for the employees on that list.
18. In support of its application for certification, the applicant union filed documentary evidence in the form of membership evidence cards. The cards are signed by each employee concerned, are dated within the six-month period immediately preceding the certification application date, and are supported by a duly completed Declaration Verifying Membership Evidence.
19. The Board is satisfied, on the basis of all the evidence before it that greater than fifty-five per cent of the employees of the responding party in the bargaining unit on the certification application date, had applied to become members of the applicant on or before that date.
20. A certificate will issue to the applicant.
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2555-93-R International Brotherhood of Electrical Workers, Local 353, Applicant v. General Signal Limited, Responding Party

Bargaining Unit - Certification - Union earlier filing and withdrawing certification application - Board not accepting employer's position that it should exercise its discretion under section 105(2)(i) of the Act not to consider the union's current certification application - Employer operating various commercial "units" or entities in Ontario under single corporate umbrella - Employer operating at only one location in City of Barrie - Union seeking to represent bargaining described as all employees of employer in municipality - Employer proposing unit described as all employees in service division of named "unit" - Board finding union's proposed bargaining unit appropriate - Certificate issuing

BEFORE: *Roman Stoykewych*, Vice-Chair, and Board Members *J. A. Ronson* and *K. Davies*.

DECISION OF VICE-CHAIR, ROMAN STOYKEWYCH AND BOARD MEMBER, K. DAVIES;
March 8, 1994

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.
3. The applicant seeks to represent the employees in the responding party's Barrie operation, who are engaged in the installation, service, maintenance and verification of fire protection, emergency lighting and life safety systems. Although the parties had resolved the substantial majority of issues relating to this application, at the hearing of this matter on November 15, 1993 the Board received the parties' agreed statements of fact and entertained their submissions con-

cerning the employer's request that the Board impose a bar to the present application or to order a vote in light of the filing and withdrawal of an earlier application regarding these employees, and the employer's further position that the applicant's proposed bargaining unit was inappropriate.

I

4. The responding party employer took the position that the circumstances of the trade union's filing and withdrawal of an earlier application (Board File No. 2130-93-R) with respect to the same employees were such that the Board should exercise its discretion under section 105(10)(i) of the Act and to not consider the present application. Having been advised that the "count" in the first application was such that the trade union would not be in an automatically certifiable position, it was alleged, the trade union's subsequent conduct in withdrawing, collecting further evidence and then reapplying was an attempt to "manipulate" the certification process and to thereby avoid the consequences of a representation vote. It appears that the trade union was not aware of the employee status of a certain employee at the time of the first application, and given the small number of employees in the unit, this resulted in its application not having adequate membership support. Upon being advised of the count, the trade union immediately obtained the additional membership evidence that would assure it automatic certification, sought to withdraw the earlier application, and the present application was filed. Although a differently constituted panel of the Board, in a decision dated October 21, 1993 granted the applicant leave to withdraw the earlier application, the employer has sought a reconsideration of that decision. Accordingly, for the purposes of the present application, we are prepared to assume that the earlier application was dismissed. Counsel for the employer relied upon *Matthias Ouellette*, 1955 CLLC par. 18,026 in support of the argument that a bar should be imposed upon the present application because the trade union was attempting to circumvent the calling of a representation vote. In the alternative, the employer requested that in light of the circumstances adverted to, the Board should exercise its discretion and order a representation vote. Counsel advanced *Children's Aid Society of Owen Sound and the County of Grey*, [1984] OLRB Rep. July 995 to support that proposition.

5. The Board is satisfied that the decision in *Mathias Ouellette*, *supra*, has no application to the present circumstances. In this respect, the Board notes that the decision expressly limits its application "to situations in which a vote has been directed and in which the applicant union applies for leave to withdraw its application before the vote is taken." The practise of the Board has been to limit the imposition of a bar to circumstances in which a request for withdrawal of an application is made at a stage of proceedings where the applicant must be anticipating defeat upon direction of a representation vote, or when there are some special or extreme circumstances present. Otherwise, the Board has determined that there is nothing inappropriate in a trade union refiling an application for certification, provided it does not do so in a repetitive or abusive manner. (*J. W. Crooks*, [1972] OLRB Rep. Feb. 126.) Bearing this in mind, the Board sees nothing in the statement of fact agreed upon by the parties that could give rise to an inference that the applicant acted in a manner that constitutes a manipulation of the Board's processes nor any other special circumstances that would cause the Board to exercise its discretion either to impose a bar or to order a vote.

6. The employer also argued that the Board should exercise its discretion to order a vote in the present circumstances in light of the operation of section 8(4) of the Act, which has the effect, among other things, of restricting the receipt of membership evidence by the Board to evidence that has been filed by the application date. It was argued that the union's withdrawal and reapplication without notice to the concerned employees caused an unfairness to those employees who may have wished to revoke their support for the applicant but who would have been unaware of the union's intention to file a second application. The employer likened this to the creation, by

the union, of a later terminal date for itself than for the objecting employees. The Board was urged to exercise its discretion to order a representation vote to remedy this unfairness.

7. As indicated above, the Board does not accept the employer's characterization of the events surrounding the withdrawal and reapplication as constituting manipulation or abuse of the Board's procedures. Furthermore, the Board sees nothing to distinguish the present circumstances from those in *General Signal Limited*, [1993] OLRB Rep. June 509, in which the present applicant sought to certify the employees at the responding party's Mississauga location (hereinafter referred to as the "Mississauga decision"). Faced with the same argument, the Board in the Mississauga decision noted that there was nothing inherently improper or colourable about a trade union refiling an application in the shadow of an earlier one, and then stated:

Moreover, although the objecting employees' ability to voice their objection to the union in these proceedings would be limited, we are of the view that this effect results from the intended operation of section 8(4) of the Act, not from the action of the trade union. Accordingly, we do not find that rights have been affected in a prejudicial manner so as to require the Board to exercise its discretion to order a vote.

8. It should be noted that, unlike in the Mississauga decision, in the present application there was no representation received by the Board either with respect to the earlier application (2130-93-R) or to the present application from an employee or employees seeking to withdraw their membership application. We are in agreement with the reasoning in the Mississauga decision and see no reason in the present circumstances for the Board to exercise its discretion to order a vote. Accordingly, the Board will not accede to the responding party's request that we do so.

II

9. The employer also took the position that the bargaining unit sought by the applicant was inappropriate. The bargaining unit sought by the applicant was:

all employees of General Signal Limited working at or out of the City of Barrie, save and except supervisors and persons above the rank of supervisor, office and sales staff.

It was the responding party's position that the applicant's bargaining rights ought to be restricted both with respect to the "Edwards Unit", which is the sole Unit of the employer operating in the City of Barrie, and with respect to that Unit's "service division." The submissions of the parties proceeded on the basis of an agreed statement of fact that made the calling of oral evidence unnecessary.

10. General Signal Limited is a corporation operating under the laws of the Province of Ontario. There are ten separate "Units" under the General Signal Limited umbrella who, although identifiable commercial entities, in themselves have no independent legal personality. Thus, consolidated statutory and tax reporting are conducted through General Signal Limited. It is agreed that the parent corporation is the sole legal entity and that it is the employer of employees engaged by each of the Units. To this effect, the party to these proceedings is identified in the response filed with the Board, and hence, appears in the style of cause, as "General Signal Limited".

11. The Units are engaged in distinct service or manufacturing enterprises. A majority of the units are involved in either the manufacture, sales or service of electrical instruments or equipment. Nevertheless, a number of the Units are engaged in activities not directly related to that core area of operation. For example, the corporation's Lindberg Unit is primarily engaged in the manufacture, sales and service of industrial furnaces and heat treating equipment. The Edwards Unit,

whose employees are the subject-matter of the present application, is engaged in the manufacture and service of life-safety, fire alarm, and signalling devices and systems. The facility at 250 Bayview Drive in Barrie is the sole location within the City of Barrie either for the Edwards Unit or for any other Unit operating under the General Signal Limited umbrella. There is no evidence that there is any intention on the part of any of the Units to open another facility in the Barrie area in the future.

12. It appears that the Units operate in a predominately autonomous manner and function as distinct commercial entities. The corporation is structured such that each unit is responsible for its own divisional operations. Each Unit maintains a separate set of books and operates as a "separate profit centre". Finally, labour relations matters within each unit are conducted separately from those in other Units. This is reflected in a diversity of employment practices.

13. While there are certain exceptions to the general rule of autonomous operation of the units' respective labour relations regimes, these exceptions are relatively few in number and minor in significance. For example, there was evidence that the Human Resources Manager of the Edwards Unit would occasionally receive and respond to requests for advice from other Units, especially with respect to operation in the U.S. context. In addition, in the interests of economy of scale, all Units purchase benefit plans from the same insurer, although the extent of the benefit plan offered to the employees is a matter to be determined by the particular Unit purchasing it. Each Unit then pays a *pro rata* share to cover the costs for the Unit. Finally, payroll services will be provided by one Unit to another on an occasional basis. However, it is agreed that this practice is rare, and is restricted to such temporary situations as where an established Unit is providing assistance to a new Unit starting up operations in Canada.

14. There was no evidence as to how many plants or facilities the corporation presently operates in Ontario, the relative sizes of the Units, or the number of Units that have a presence in the province. However, in two instances in which collective bargaining has transpired involving the Edwards Unit, the bargaining rights are limited by the Unit. Thus, the responding party employer is party to a collective agreement with the United Steelworkers of America at its Edwards Unit facility in Owen Sound, in which the bargaining rights of the trade union are restricted to "Edwards, a Unit of General Signal Limited." Similarly, the present applicant has been certified to represent a group of employees at the Edwards Unit in Mississauga. The bargaining unit description, arrived at upon the consent of the parties, further restricts the trade union's bargaining rights to the "service division of its Edwards Unit." However, it appears that the further "divisional" restriction arose out of the presence in Mississauga of an "International Division" that, while operating separately from the remainder of the Edwards Unit, technically remained part of that Unit. It should be noted that there was no evidence of the presence of an "International Division" in the Edwards Unit's Barrie operations.

III

15. In support of its proposed bargaining unit, in which the applicant would be granted bargaining rights for the employees of General Signal Limited without reference to a unit or divisional restriction, counsel for the applicant referred the Board to its long-standing policy to grant certificates without such restriction when only one division of a corporate entity had operations in the municipality in which the trade union seeks bargaining rights. In particular, counsel for the applicant directed the Board to *Hunter Douglas*, [1985] OLRB Rep. April 535.

16. In *Hunter Douglas*, *supra*, the employer operated only one facility in Mississauga, although three of its other divisions were operating in the Metropolitan Toronto area (which does not include Mississauga). The Board did not accept the employer's argument that the bargaining

rights of the trade union ought to be restricted with respect to a single division when the union sought certification of employees at its Mississauga facility. The Board noted that, where an employer has only one location within a municipality, the Board's consistent practice has been to describe the *geographic scope* of the bargaining unit by reference to the municipality in order to prevent the erosion of the trade union's bargaining rights that would result from a change in the operation's street address. (*York Steel Construction Limited*, [1980] OLRB Rep. Feb. 293). The Board, at paragraph 8 of the *Hunter* decision, reasoned that the interests militating in favour of the protection of the trade union's bargaining rights are even more compelling when the employer operates more than one corporate division but only one such division is present in the particular municipality:

The inclusion of a reference to a division of the respondent in the appropriate bargaining unit is a destabilizing factor in bargaining rights. It is arguably open to the respondent to change its internal corporate structure and change and/or substitute a different division in its present premises in Mississauga. It is arguably even easier to effect a change in the internal corporate structure of the respondent than it is to relocate to a new address in Mississauga.

Although the Board appreciated that the bargaining unit description without the divisional restriction might have the effect of compromising the interests in self-determination of employees should any of the other divisions commence operations in Mississauga (because they would be swept into the bargaining unit of the incumbent trade union upon entry into the municipality), nonetheless, in "balancing the interests of present employees against the possible interests of unforeseen future employees, the balance is struck in favour of addressing the interests of present employees in the stability of their bargaining relationship with their employer." (*Douglas Hunter*, *supra*, at paragraph 7.) Thus, although a different result may obtain in circumstances, such as the food service industry, where site-specific bargaining units are not uncommon, (*Cara Operations Limited*, [1992] OLRB Rep. Feb. 131) the practise of the Board has been to certify the applicant without divisional restriction where only one division of a corporate entity is operating in the municipality in which bargaining rights are sought. (See also *Belkin Inc.*, Decision of the Board dated August 11, 1986, unreported.)

17. It was precisely the balancing of interests effected in *Hunter* that counsel for the employer asserted was inherently faulty, and whose reassessment was all the more necessary in light of what he characterized as developments in the remedial authority of the Board. Although counsel for the employer recognized that the Board policy to date has been to grant the bargaining unit presently sought by the applicant, he contended that the vigilance with which the Board sought to protect bargaining rights, and the concomitant compromise of individuals' rights to a choice with respect to their trade union representation, is now unnecessary. Specifically, he argued that since the Board's decision in *Metroland Printing, Publishing and Distributing*, [1991] OLRB Rep. Sept. 1069, it is now open for the trade union to protect its bargaining rights by means of an application under section 1(4) notwithstanding the absence of an independent legal personality in the entities concerned. Accordingly, it was asserted, the erosion of bargaining rights resulting from internal corporate reorganizations can now be redressed by means of a common employer declaration rather than jeopardizing the incoming employees' statutory right to choose their bargaining representative.

18. Counsel for the employer also argued that because the structure of the corporate parent lacks functional integration, the bargaining unit sought by the applicant had the potential of creating problems of viability and various difficulties in administration in the event that another Unit were to commence operations in Barrie. Counsel adverted to the possibility that employees with widely divergent backgrounds and skills would be required to bargain together, and as a result, the bargaining structure that the trade union was requesting could be unworkable due to a lack of com-

munity of interest. Similarly, counsel predicted that serious administrative problems would ensue for the employer from the operation of a single collective agreement for what would be multiple units with divergent employment relations policies.

IV

19. The Board cannot accept the employer's submission that the provisions of section 1(4) are able to redress each of the problems associated with the instability of bargaining rights were the bargaining unit to be restricted to the Edwards Unit. It is to be borne in mind that the purpose of section 1(4) is to preserve, rather than to create, the bargaining rights a trade union has been accorded either through certification or by means of subsequent collective bargaining. Thus, a restricted scope to those rights at certification may well serve to narrow the relief available to the trade union upon a subsequent common employer application. In this respect, the employer's reliance upon section 1(4) contains an element of circularity in that it does not address the essential question of what those bargaining rights are to be. Moreover, while the decision in *Metroland* has the effect of joining entities without independent legal personality in a common employer declaration, the Board notes that that case dealt with circumstances in which the corporate entity was not named as the employer. Therefore, to a substantial degree, the issue of whether or not corporate divisions, which were not in themselves legal entities, could be the subject-matter of a common employer declaration was litigated in that context. With that in mind, it is difficult to understand the respect in which the decision would advance the Board's remedial scope in circumstances, such as the present ones, where, consistent with the Board's practice (*Beatrice Foods*, [1982] OLRB Rep. June 815; *Metroland*, *supra*), the corporate entity is named as the employer and no doubt exists as to its identity.

20. However, the *Metroland* decision is instructive in another, more practical respect. As is indicated in paragraph 3 of that decision, the resolution of the matter required 15 days of hearing, with an elapsed hearing time extending well over one year. The parties' experience in the *Metroland* case is by no means unusual, since the litigation of issues involved in section 1(4) applications frequently requires the resolution of difficult factual issues relating to the operation of a number of enterprises over the course of many years. The Board is not satisfied that a bargaining unit description that would effectively serve as an invitation to such protracted litigation would serve the overall interest of stability in collective bargaining.

21. In light of the foregoing, then, we cannot agree that the protection provided to the trade union's bargaining rights under section 1(4) of the Act is an adequate substitute for the stability afforded by designating the trade union as the bargaining agent for all of the employees of the employer. Although the Board appreciates that the bargaining unit description without a Unit restriction may have the effect of sweeping in employees engaged by other Units of the corporation were those Units to locate in Barrie, we note that those are potential interests of employees, as distinct from the interests of current employees in the stability of their existing bargaining relationship. Nothing that the employer has advanced has convinced us that the balancing of interests effected in the Board's policy as articulated in *Hunter Douglas*, *supra*, is defective and accordingly we respectfully agree with that reasoning and find the labour relations considerations described therein to be equally applicable to the present circumstances.

22. With respect to the employer's other arguments, the Board notes that they were premised on the possibility that the employer would decide to begin operation of another division in the Barrie area, and, in turn, that the absence of community of interest and the possibility of labour relations problems were based on a worst-case scenario. To some extent all bargaining unit determination involves a degree of speculation, based on the facts known at the time, regarding events

that may occur in the future. However, the concerns expressed by the employer with respect to labour relations difficulties are doubly speculative in that they represent conjecture about matters that are premised on the possibility of yet another set of facts occurring. Moreover, these future circumstances such as potentially conflicting employment practices, are ones over which the employer presently exercises a degree of control. Accordingly, the Board is not satisfied that the employer is able to demonstrate “serious labour relations problems”, as is contemplated in the test set out in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266 and therefore the Board cannot accept the employer’s submission in that respect.

23. Similar considerations apply to the employer’s argument as it relates to the alleged lack of community of interest. Although the concept of community of interest may be of importance with respect to disparate interests arising out of the operation of existing facilities, it is more difficult to appreciate its significance when one of the two facilities has yet to be established. As the Board has recently indicated in *Mississauga Hydro*, [1993] OLRB Rep. June 523, whether or not there exists a community of interest between two groups of employees often results less from the pre-existing attributes of those groups than from their history of separate treatment in the context of their employment relationship. In any event, the Board over the last decade has placed considerably less reliance on alleged divergences in interests amongst employees in the course of bargaining unit determination and has frequently certified groups of employees with widely divergent education, skills and employment conditions. Its experience in this regard is that such groups can bargain together collectively in a satisfactory manner. (*Hospital for Sick Children*, *supra*.) In the present application, aside from the evidence of the “primary business activity” of each unit, there is no evidence regarding the work the employees perform, the skills that they utilize, or any of the other indicia related to community of interest. Consequently, even were the Board inclined to speculate as to possible divergences of interests that might arise from the distinct activities engaged in by the various units, we have not been provided an adequate factual basis for such conjectures.

24. Finally, as indicated, the employer also sought to restrict the applicant’s bargaining unit to the “service division” of the Edwards Unit. Although that position was never formally abandoned by the responding party employer, this aspect of its position was not argued during the course of the parties’ submissions. In any event, the Board notes that, unlike in the Mississauga location of the Edwards Unit, there is no “international division” operating in the Barrie area. While our ruling with respect to the “Unit” restriction applies with even greater force to this issue, in the absence of any other division of the Edwards Unit operating in Barrie, a further restriction of the bargaining rights to the service division of the Edwards Unit would not be appropriate.

25. Having regard to the foregoing the Board finds that:

all employees of General Signal Limited working at or out of the City of Barrie, save and except supervisors, persons above the rank of supervisor and office and sales staff,

constitute an appropriate unit for collective bargaining.

IV

26. In accordance with the Rules of Procedure respecting applications for certification, the named employer has filed a list of employees in the bargaining unit, together with sample signatures for the employees on that list.

27. In support of the application for certification, the applicant filed documentary evidence in the form of membership application cards. The cards are signed by each employee concerned,

are dated within the six-month period immediately preceding the application date, and are supported by a duly completed Declaration Verifying Membership Procedure.

28. On the basis of all the evidence before it, the Board is satisfied that more than fifty-five per cent of the employees in the bargaining unit, at the time the application was made, were members of the applicant on October 21, 1993, the certification application date, or had applied to become members of the applicant on or before that date.

29. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER JAMES A. RONSON; March 8, 1994

1. I agree with my colleagues that the applicant has not manipulated the processes of the Board nor are there any other special circumstances that should cause us to order a vote. In saying this, I do not agree with the reasoning found in paragraphs 7 and 8 of their decision.

2. I would describe the unit in the terms requested by the employer. In doing so, I am being consistent with my position taken in previous cases concerning the same issue (see *Belkin Inc.*, *supra*). The only certain result of this decision by the Board is that the City of Barrie will *not* be the new location of other divisions of the employer.

3780-93-R Ontario Nurses' Association, Applicant v. Glazier Medical Centre, Responding Party

Bargaining Unit - Certification - Practice and Procedure - Following participation in certification waiver programme and after agreeing on a number of issues related to union's certification application (including bargaining unit description), parties apparently agreeing to waive hearing - Legal identity of employer only issue apparently outstanding - Employer subsequently retaining new counsel, seeking to file additional materials and advising Board of its intention to attend officer meeting and Board hearing - Employer asking Board to find appropriate bargaining unit to be one other than that which had earlier been agreed to by the parties - Employer relying on fact that Waiver of Hearing Form A-5 not submitted for proposition that it had not agreed to waive hearing - Board not permitting employer to resile from agreement on bargaining unit - Board finding agreed-upon unit appropriate - Board indicating that it will consider employer request, if made, for hearing on question of legal identity of employer

BEFORE: *Gail Misra*, Vice-Chair, and Board Members *R. W. Pirrie* and *J. Redshaw*.

DECISION OF THE BOARD; March 22, 1994

1. This is an application for certification filed on February 3, 1994. A response to the application was filed on February 14, 1994.

2. Following its normal procedure, the Board contacted the parties to canvass their respective positions regarding all issues arising out of the case.

3. On February 23, 1994, a teleconference was held between a Labour Relations Officer of

the Board, counsel for the responding party and a representative of the applicant. The only matter which counsel for the responding party wished to clarify at that juncture was the legal identity of the responding party. The applicant took no position with respect to the responding party's legal identity. It is the position of the applicant that as a result of the parties' agreement on various issues, outlined later in this decision, a Labour Relations Officer meeting set for March 2, 1994, and a hearing into this application scheduled for March 7, 1994, were waived. The responding party takes the opposite position.

4. On February 28, 1994, the Board received correspondence from another law firm indicating it now represented the responding party, wished to file additional materials, and intended to attend the Labour Relations Officer meeting on March 2, 1994, and the hearing scheduled for March 7, 1994.

5. Later on February 28, 1994, the Board received submissions from counsel for the responding party indicating that the responding party was requesting that the Board exercise its discretion under section 6(1) of the *Labour Relations Act* and find the appropriate bargaining unit to be one other than that which had been agreed upon by the parties on February 23, 1994. A request was also made to amend the Response and to extend the terminal date to present the new filings.

6. The Board solicited further submissions from the parties and is now prepared to render its decision.

7. There is no contention in the responding party's submissions that agreement was not reached on the bargaining unit description or the list and there is no suggestion that the count was not released on the basis of such agreements. The responding party relies on the facts that the proper name of the employer had not been ascertained and that the Waiver of Hearing, Form A-5, had not been submitted, for the proposition that the responding party had not agreed to waive its right to a hearing.

8. The applicant's submission is that the parties had agreed to the bargaining unit description during the teleconference on February 23, 1994, and that the count was then released. The only issue of concern to the responding party's counsel was the legal identity of the responding party. The applicant understood the employer's counsel to have waived the right to a hearing and understood further that the applicant was in a certifiable position.

9. The Board finds that on February 23, 1994, the applicant agreed to the responding party's bargaining unit description and the list of employees was agreed upon without any challenges being made by either side. In accordance with Board practice, the Labour Relations Officer released the count to the parties and the applicant appeared to be in a certifiable position.

10. As outlined in *Santa Maria Foods*, [1981] OLRB Rep. Nov. 1618, the Board's Procedures and Rules for the certification process are set precisely so as to avoid the mischief of either party gerrymandering the employee list or the structure of the bargaining unit to avoid or favour certification. In that case the Board went on to say as follows:

8. At the outset of the hearing the Board will generally allow the employer to amend the lists filed to reflect any new information not previously available or to correct any error. During the hearing the Board does not announce the count of employees or any union membership until the description of the bargaining unit is settled. Similarly it does not announce the membership count until the count of employees in the unit is determined, subject, of course, to such outstanding challenges to the list as may have been made to that point in the hearing. These are rules well known to the parties and articulated in the Board's jurisprudence. (See, *Gwell Invest-*

ments Ltd., [1971] OLRB Rep. Oct. 675; *The Corporation of the Township of Kingston*, [1975] OLRB Rep. Apr. 370; *Inter City Food Services Inc.*, [1976] OLRB Rep. July 388; *Greater Windsor Investments Ltd. Windsor Nursing Home*, [1976] OLRB Rep. Sept. 515). Without these general rules certification hearings would be endless meanderings without map or compass, each turn in the journey being dictated by changing perceptions of the parties as to what best serves their own interests. That is why, absent extraordinary circumstances, the Board does not entertain submissions on the structure of [the] bargaining unit or the list of employees in the unit after the point in the hearing when the count has been given.

11. Since 1990 the Board has implemented some changes to its practices with respect to certification applications in an attempt to protect valuable hearing time and to minimize litigation. The Board's "waiver" process was outlined by Chair Mitchnick, as he then was, in *Cor Jesu Re-education Centre of Timmins Inc.*, [1992] OLRB Rep. March 298, an excerpt of which follows:

The standard way in which the Board addresses an application for certification, whether it be, as was common in the past, by a panel at a hearing, or as has become more common recently, by an Officer at a meeting, is to begin with a discussion of the bargaining-unit "description". Once the parties' positions have been identified in that regard, the inquiry moves on to a review and discussion of the Employee List. At that point a party is not permitted to "resile" from positions previously arrived at with respect to the description of the bargaining unit, except to the extent that such alterations may properly be attributed to a dispute becoming identified only as a result of disclosure for the first time of the Employee List. Once again see, for example, *Santa Maria Foods*, [1981] OLRB Rep. Nov. 1618, as recently explained and confirmed by the Board in *Fort Erie Duty-Free Shoppe Inc.*, [1991] OLRB Rep. Nov. 1268. Once the bargaining-unit description and Employee List have both been dealt with, the process goes on to deal with the membership evidence filed by the applicant in support of its application, in most cases culminating in an identification of the "count" (i.e. percentage level of support), or "appearance" of the count (the potential results of the application, depending on how the issues remaining in dispute fall to be resolved). And at *that* stage the employer is also granted access to the content of the applicant's Form 9 Declaration, including the description of any "irregularities" disclosed therein.

12. In the circumstances of this case, the panel is not persuaded that the responding party ought to be permitted to resile from its agreement on the structure of the bargaining unit. In reaching our decision, the panel notes that it was the responding party's description of the bargaining unit which the applicant agreed to on February 23, 1994. There are no extraordinary circumstances in this case to cause the Board to depart from its general rule.

13. If the responding party wishes to request a hearing on the question of the legal identity of the employer and should the applicant not be in agreement, then the Board may consider such a request.

14. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

15. In accordance with the Rules of Procedure respecting applications for certification, the named employer has filed a list of employees in the bargaining unit, together with sample signatures for the employees on that list.

16. In support of its application for certification, the applicant union filed documentary evidence in the form of membership application cards. The cards are signed by each employee concerned, are dated within the six-month period immediately preceding the certification application date, and are supported by a duly completed Declaration Verifying Membership Evidence.

17. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on February 3, 1994, the

certification application date, had applied to become members of the applicant on or before that date.

18. The responding party, in its submissions of February 28, 1994 and March 3, 1994 requested that the Board exercise its discretion under section 6(1) of the *Labour Relations Act* to amend the bargaining unit description agreed upon by the parties to one which the responding party now claims to be a more appropriate bargaining unit. While the Board has the discretion to determine the unit of employees that is appropriate for collective bargaining, where there is an agreement between the parties, such agreement is not tampered with lightly. We find that the circumstances in this case provide no compelling reasons for exercising our discretion to change a bargaining unit which was agreed to by the parties and which is not contrary to any public policy.

19. Having regard to the agreement of the parties, the Board further finds that:

all registered and graduate nurses employed in a nursing capacity by Glazier Medical Centre in the City of Oshawa, save and except supervisors and persons above the rank of supervisor.

constitute a unit of employees of the responding party appropriate for collective bargaining.

20. On February 23, 1994, counsel for the responding party had undertaken to provide the Board with the legal identity of the responding party, but to date the Board has not received this information. The responding party is hereby directed to provide the Board with clarification of its legal identity within seven days of the release of this decision. Should the Board not receive this information by such time, a certificate will issue in the name of the responding party as indicated in the Response dated February 14, 1994.

3779-93-R Ontario Nurses' Association, Applicant v. Hamilton Program For Schizophrenia Inc., Responding Party

Bargaining Unit - Certification - ONA applying for unit of nurses employed as Case Managers - Employer proposing unit of Case Managers irrespective of their professional qualifications - Board finding unit of all Case Managers appropriate - Certificate issuing

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *W. A. Correll* and *E. G. Theobald*.

APPEARANCES: *Sharon Faulds* for the applicant; *Mark Zega* for the responding party.

DECISION OF THE BOARD; March 24, 1994

1. The style of cause is hereby amended to reflect the correct name of the responding party: "Hamilton Program For Schizophrenia Inc."

2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

3. This is an application for certification in which the parties through a Labour Relations Officer have reached agreement on all matters in dispute between them with the exception of the issue of the description of the bargaining unit.

4. The parties agreed to the following partial description of the bargaining unit:

All *Registered and Graduate Nurses* employed in the capacity of Case Managers by the Hamilton Program for Schizophrenia Inc. in the City of Hamilton, save and except the Business Administrator and persons above the rank of Business Administrator.

Clarity Note: For the purpose of clarity, the parties further agreed to the following exclusions:

Office and clerical staff, Community Support Workers, Research Assistants, Clinical Director, Director of Education, Attending Physicians and Psychiatrists.

It is the applicant's position that the bargaining unit be limited to Case Managers in the employ of the responding party who are Registered and Graduate Nurses. The responding party's position is that the bargaining unit should include all Case Managers employed by the responding party, irrespective of their qualifications. There are 5 individuals out of a total of 9 Case Managers who have Registered and Graduate Nurse status. The others have other qualifications such as graduate degrees in social work or occupational therapy.

5. On March 7, 1994, the Board held a hearing to entertain evidence and argument with respect to this issue. The Board heard the evidence of Dr. Peter Cook, the responding party's Executive Director. The representative of the applicant chose to call no evidence in support of the unit applied for, and did not cross-examine Dr. Cook on the vast bulk of his testimony. Accordingly, the only evidence before the Board is the largely unchallenged evidence of the responding party.

6. In our view, it is unnecessary to set out in great detail the evidence of Dr. Cook. It suffices to say that the evidence of Dr. Cook establishes that the bargaining unit proposed by the applicant would cause serious labour relations problems for the employer should it be accepted by the Board. In particular, we are concerned with the potential for fragmentation of the employer's work force. In this regard, we are of the opinion that the applicant's proposed unit does not satisfy the test described by the Board in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, at paragraph 23.

7. The evidence before the Board suggests that all Case Managers irrespective of their qualifications, have, for the past ten years, "bargained" collectively with the responding party in an informal manner without difficulty, and there is no reason to believe that they cannot continue to do so if represented by the applicant. On the basis of the evidence before us, we are of the view that it is appropriate for all Case Managers of the responding party to be included in the bargaining unit. Accordingly, we find the following bargaining unit to be an appropriate one for collective bargaining:

all employees of the Hamilton Program for Schizophrenia Inc. employed in the capacity of Case Manager, in the City of Hamilton, save and except the Business Administrator and persons above the rank of Business Administrator.

Clarity Note: For the purpose of clarity, office and clerical staff, Community Support Workers, Research Assistants, Clinical Director, Director of Education, Attending Physicians and Psychiatrists are excluded from the bargaining unit.

8. The Board has determined that the list of employees of the responding party for the purposes of the "count" is composed of nine employees.

9. In support of its application for certification, the applicant union filed documentary evi-

dence in the form of membership application cards. The cards are signed by each employee concerned, and are supported by a duly completed Declaration Verifying Membership Evidence.

10. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on February 3, 1994, the certification application date, had applied to become members of the applicant on or before that date.

11. A certificate will issue to the applicant.

2997-93-R Communications, Energy, and Paperworkers Union of Canada, Applicant v. Insulec Ltd., Responding Party, v. Group of Objecting Employees, Objectors

Bargaining Unit - Certification - Petition - Employer operating separate "electrical" and "bottle cap" divisions out of separate buildings with separate street addresses on one site - Union applying for certification and proposing bargaining unit including employees of both divisions - Employer taking position that separate units appropriate - Board not satisfied that more comprehensive unit would cause serious labour relations problems - Union's proposed unit found appropriate - Board not satisfied that petition reflecting voluntary wishes of the employees who signed them - Certificate issuing

BEFORE: *Janice Johnston*, Vice-Chair, and Board Members *R. M. Sloan* and *R. R. Montague*.

APPEARANCES: *J. James Nyman* and *Jim Counahan* on behalf of the applicant; *Irv Kleiner* and *Mac Hogarth* on behalf of the responding party; *Milton Verskin* and *Greg R. McDonald* on behalf of the objectors.

DECISION OF THE BOARD; March 8, 1994

1. The style of cause is hereby amended to reflect the correct name of the responding party: "Insulec Ltd."

2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

3. This is an application for certification. The parties reached partial agreement with regard to the appropriate bargaining unit description as follows:

Bargaining Unit #1

All employees of Insulec Ltd. at its Unipac Division located at 145 Edward Street in the Town of Aurora and at its Insulec Division located at 125 Edward Street in the Town of Aurora save and except Supervisors, persons above the rank of Supervisor, office, clerical and technical staff, Engineering and Sales Staff.

Clarity Note: The parties further agree that office and clerical staff include the administrative

staff and technical includes the Laboratory Technicians, Quality Assurance Technical Staff, chemists and Production Scheduling Assistants which are all excluded from the Unit.

And pending resolution by the Board excluding as well its Insulec Division located at 125 Edward Street in the Town of Aurora. In which case there will be Unit #2 which will read:

Bargaining Unit #2

All Employees of Insulec Ltd. at its Insulec Division located at 125 Edward Street in the Town of Aurora save and except Supervisors, those above the rank of Supervisor, office, clerical and technical staff, Engineering and Sales Staff.

Clarity Note: The parties further agree that office and clerical staff include the administrative staff and technical includes the Laboratory Technicians, Quality Assurance Technical Staff, chemists and Production Scheduling Assistants which are all excluded from the Unit.

4. At the hearing convened to deal with this application, there were three issues in dispute between the parties. The applicant, the Communications Energy and Paperworkers' Union of Canada (the "union"), and the objecting employees took the position that there should be one bargaining unit whereas the responding party (the "company" or "Insulec Ltd.") took the position that there should be two bargaining units. There were also filed with the Board timely and relevant individual statements of desire or petitions in opposition to the union. As there was sufficient overlap of employees who had signed a petition and a membership card in the union, the Board determined that it was appropriate to inquire into the voluntariness of the petitions. Should the Board be satisfied that the petition documents reflect the voluntary expression of the wishes of those employees who signed them, pursuant to section 8(3) of the *Labour Relations Act* (the "Act"), the Board has the discretion to direct the taking of a representation vote. The third issue concerned whether Mr. Joe DaSilva was an employee of the company and therefore properly included on the list of employees in the bargaining unit.

5. The Board heard evidence from nine witnesses over seven days of hearings. For the purposes of resolving the issues before us it is not necessary to set out all of the evidence in great detail.

The Bargaining Unit Description Issue

i) The Facts

6. Insulec Ltd. is made up of two divisions. One division will be referred to as the "Insulec" division or the "electrical" division. This division produces flexible electrical parts or insulation for companies such as Westinghouse and General Electric. The second division will be referred to as the "Unipac" division. The Unipac division is in the business of producing bottle cap liners such as the heavy paper liner one would find sealing a new jar of mayonnaise or induction sealable liners such as are found on containers of windshield washer fluid.

7. In 1967, Mr. Mac Hogarth, the owner, sole shareholder, president and general manager of Insulec Ltd., bought the company. At that time it was known as Universal Insulators Company Limited. The majority of the business at that time was made up of electrical as opposed to bottle cap work. That changed gradually over time and today the Unipac or bottle cap division makes up the majority of the business and employs the majority of the people. Although both businesses were originally carried out under the name of Universal Insulators Company Limited, in the early 1980's the Unipac division was created and additional buildings adjacent to the original buildings

were purchased to house the new division. Some existing equipment was moved over to the new premises and new equipment was also purchased.

8. There are two main buildings on the site, one for each division, and numerous smaller buildings used in the manufacturing process. There is also a third large building on the site in which the head office and research and development staff are located. The three main buildings each have a different street address and each manufacturing plant has its own sign. Each division has its own lunch room, change room and parking lot. There is a separate sales force for each division although they each report to a single sales manager. The two divisions are held out to the public as separate businesses and each has its own distinct clientele. Each division maintains its own financial records, letterhead and promotional material.

9. Although some of the equipment and processes are different, many of the same basic machines are found in both divisions. For example, each division has equipment referred to as slitters and laminators. There is some generic training and specific training on a particular piece of equipment is also offered.

10. There are two full shifts operating in the Unipac division, a day shift and an afternoon shift. In the Insulec division there is a day shift and a few employees who work on the afternoon shift. There are two supervisors who rotate shifts with their staff in the Unipac division and one supervisor working days in the Insulec division. Each supervisor is responsible for the staff and operations on his/her shift with the exception of the afternoon shift supervisor in the Unipac division. In the event of problems or emergencies, that supervisor is also expected to assist the employees working on the afternoon shift in the Insulec division. The supervisors report to a plant manager.

11. As already noted, Mr. Hogarth is the president and general manager of both divisions. He plays an active role in the management of both divisions. Working under him, with responsibility for both divisions, are the sales manager, the product development manager, the plant manager and the plant engineer. There is one training co-ordinator who conducts training for both divisions; one maintenance department, located in the Insulec building with a supervisor and several employees who perform work in both divisions; and one research and development group which performs work on behalf of both divisions.

12. There is one payroll system and one compensation plan or wage structure for all employees. There is one benefit package and one vacation policy for all employees. Seniority is recognized and applied based on overall company seniority. Job vacancies are posted in both locations and employees move from one division to the other. All employees are provided with bereavement leave, boot and back support/safety boot allowances, paid jury duty and shift premium. Overtime is paid to all employees on the same basis.

13. It was not disputed that some employees physically located in one division perform work on behalf of both divisions. For example, there is one bailer operator located in the Insulec division who bails waste material produced in both divisions; one still operator located in the Insulec division who reclaims solvents for use as cleaning agents in either division; Mr. Dennis Dalrymple currently operates a rewinder machine located in the Insulec division and fifty per cent of his regular work is performed on behalf of the Insulec division and fifty per cent of his work is performed on behalf of the Unipac division; prior to operating the rewinder, Mr. Dalrymple operated a slitter in which eighty per cent of his work was Unipac work and twenty per cent of his work was Insulec work; and Mr. McDonald is the company trainer and he performs training work on behalf of both divisions.

14. It was also not disputed that there are employees who move back and forth between the two divisions and perform work in both divisions. For example, Mr. Greg Vidic operates a slitter physically located in the Insulec division (although all his work is Unipac work) and a couple of times a month, if he finishes his work or if there are any problems with his machine, he will go over to the Unipac building and assist a machine operator located in that division. Bill Riches is another employee who frequently performs work for both divisions and moves back and forth between the two.

ii) Decision

15. It is fitting to begin any analysis as to what is an appropriate bargaining unit description by reference to the Board's decision in the *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266. In that case the Board defines the test as: Does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer (see paragraph 23). In explaining the rationale for such an approach, the Board in *Hospital for Sick Children* wrote as follows:

...

17. Given that the definition of the bargaining unit can materially affect the ability of employees to organize, and that uncertainties concerning its contours can provoke costly litigation and potentially prejudicial delay, what then is the purpose of the concept of the "appropriate bargaining unit"? Quite simply, it is an effort to inject a public policy component into the initial shaping of the collective bargaining structure, so as to encourage the practice and procedure of collective bargaining and enhance the likelihood of a more viable and harmonious collective bargaining relationship. That objective is spelled out clearly in the Preamble to the Act. While the requisites for effective collective bargaining cannot always be defined with certainty, may necessitate a balance of competing collective bargaining values, and may, in any event, turn on factors beyond the Board's control, the discretion to frame the "appropriate" bargaining unit during the initial organizing phase provides the Board with an opportunity (albeit perhaps a limited one) to avoid subsequent labour relations problems. Now, of course, this is not necessarily the same thing as minimizing administrative problems for the employer or organizing problems for the union. The structures and policies that promote a maximization of the employer's business interests are not those that will necessarily describe a viable bargaining unit, or the only viable bargaining unit -- particularly since those interests may include a desire to avoid collective bargaining altogether, or limit its effectiveness. The employer's administrative structures are relevant in determining the bargaining unit, but they are not necessarily to be taken as the conclusive blue print in deciding what is appropriate. Nor is it a matter of simply giving an applicant union what it wants. It is, as we have noted, a matter of balancing competing considerations, including such factors as: whether the employees have a community of interest having regard to the nature of the work performed, the conditions of employment, and their skills; the employer's administrative structures; the geographic circumstances; the employees' functional coherence, or interdependence or interchange with other employees; the centralization of management authority; the economic advantages to the employer of one unit versus another; the source of work; the right of employees to a measure of self-determination; the degree of employee organization and whether a proposed unit would impede such organization; any likely adverse effects to the parties and the public that might flow from a proposed unit, or from fragmentation of employees into several units, and so on.

18. Some of the collective bargaining consequences of the bargaining unit determination were canvassed in *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. March 481. In that case, the applicant was seeking to represent a "craft" unit of about 100 certified electricians who were part of a maintenance department of 800 employees and an industrial work force of 2,800, all of whom were unorganized. The Board made the following general observations about the potential significance of a bargaining unit determination:

50. We may begin by observing that the notion of an "appropriate" bargaining unit is a labour relations concept with no common law antecedents and in the general case, no precise statutory definition. What it means, quite simply, is the group of employees whom it makes "labour relations sense" to lump together for the purpose of collective bargaining, and section 6(1) of the Act leaves the Board's discretion to fashion bargaining units largely unfettered. Yet the Board's determination is obviously of immense practical importance, not only for the immediate parties, but for the structure and performance of the collective bargaining system as a whole. The definition of the unit affects the bargaining power of the union and the point of balance it creates with that of the employer. It influences the potential scope and effectiveness of collective bargaining for dealing with different matters, and to some extent, even the substantive issues covered in the collective agreement. And, perhaps most important, the shape of the bargaining unit can profoundly influence the potential for industrial peace or collective bargaining discord. The more disparate are the interests enclosed within the unit, the more difficult it may be for the union to effectively represent the collectivity. Insufficient attention to these special interests generates internal strife, while too much attention to minorities may make it more difficult for a union to formulate a coherent package of proposals or make necessary concessions. On the other hand, there are dangers at the other extreme, as the Board noted in *Bestview Holdings Limited*, [1983] OLRB Rep. Aug. 1250:

28. Self-determination and community of interest often favour relatively small units, but these are not the only relevant factors in bargaining unit design. The Board must also strive to create a viable structure for ongoing collective bargaining and, to this end, undue fragmentation must be avoided. Consolidated bargaining offers several advantages over a fragmented structure. A proliferation of small units may result in unnecessary work stoppages. Each time one group goes on strike, other employees performing jobs that are functionally dependent upon the work normally done by strikers are brought to a halt. Even in the absence of functional integration, strikers may erect picket lines that keep other employees away from work. The likelihood of a strike occurring increases as the number of rounds of bargaining grows, and is further enhanced by competition among bargaining agents. Secondly, each of several units typically becomes a separate seniority district, enclosed by walls which impede the movement of employees between jobs. In addition, broader-based structures may lower the cost and thereby increase the availability of insurance schemes and benefit plans. A multiplicity of bargaining units also inevitably spawns jurisdictional disputes over the assignment of work and entails the cost of negotiating and applying several collective agreements. Finally, the existence of a single bargaining unit facilitates equitable treatment of employees doing similar jobs.

A patchwork quilt of bargaining units is a recipe for industrial unrest -- if only because in an integrated enterprise it takes only one collective bargaining breakdown to start the whole system unravelling.

The comments in *Kidd Creek* illustrate some of the problems which could arguably arise in some settings from an unduly fragmented bargaining structure -- even if the group of employees who sought to organize themselves did indeed share a distinct or identifiable community of interest.

19. Some of the same concerns underly[sic] the Board's analysis in *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459, which involved an attempt by two unions to organize differently described but overlapping units of paramedical employees. The initial problem was the description of the appropriate bargaining unit. The Board recognized that in the special environment of a public hospital pharmacists, physiotherapists, social workers, etc. all had an arguably distinct identity stemming from such factors as their specialized training, outside professional or quasi-professional associations, and particular departmental focus. In this sense, each sub-group and each department could claim a distinct community of interest. However, the Board made it clear that this did not mean that each of these groupings, would constitute a separate bargaining unit for collective bargaining purposes. Such balkanization of bargaining would create serious

administrative problems for the Hospital. Nor, for reasons set out at length, was the Board persuaded that technical, paramedical, paraprofessional and professional employees could, or should be distinguished for collective bargaining purposes, even though there were obviously important distinctions between the various sub-groupings based upon their level of education, responsibilities, degree of independence, and how far they had travelled on the "road to professionalization". The Board was of the view that for collective bargaining purposes, they could all comfortably co-exist within one paramedical bargaining unit.

20. In *Kidd Creek* (and *Stratford General Hospital*, to a lesser extent), it was suggested that an inappropriate or unduly fragmented bargaining structure could contribute to subsequent labour-management problems, tension within and between bargaining units, and an escalation of industrial conflict. Such outcomes are undesirable. If these problems can be avoided by more careful attention to the determination of the bargaining unit "at the front end", without prejudicing other collective bargaining or statutory objectives, then that attention is obviously warranted. On the other hand, if the potential for collective bargaining difficulties is less obvious or serious, or if the possible problems are less certainly connected with one bargaining unit definition as opposed to another, or if similar problems are likely to arise wherever the line is drawn, then the precise perimeter of the bargaining unit may be less important from a policy point of view.

16. The Board's approach as outlined above was further refined and clarified in the recent Board decision, *The Governing Council of the Salvation Army in Canada & Bermuda* dated January 5, 1994 (not yet reported) [now reported at [1994] OLRB Rep. Jan. 85]. In it the Board stated:

19. Both in *Hospital for Sick Children* and in later cases, the Board has explored the tension between bargaining structures that facilitate organizing (one of the goals of the Statute), and bargaining structures that are likely to be more stable and effective in the long-run (another goal of the Act). The former objective points to smaller employee groupings which are more readily organized. The latter goal points to broader-based bargaining units that have the organizational mass and bargaining power to survive over time and in changing market conditions.

20. These goals must be harmonized within a framework that now recognizes that there is no single unique and indisputably "appropriate" unit. There are degrees of appropriateness; or to put the matter another way, sensible, alternative ways in which one can define the bargaining unit without triggering (as the Board in *Hospital for Sick Children* put it) "serious labour relations problems". A trade union need not seek to represent the *most* comprehensive or *most appropriate* bargaining unit; and as the applicant or moving party, the union has a degree of flexibility in deciding what unit to organize. As long as the unit it seeks does not generate serious labour relations difficulties for the employer, it will be granted the unit it applies for.

21. If there is one theme that has been constant in the Board's concerns, both before and after *Hospital for Sick Children*, it is the aversion to fragmentation: the sub-division of an employer's enterprise into a number of separate collective bargaining components - which become separate seniority districts, which can lead to jurisdiction or inter-employee rivalries, which can generate organizational problems if one or other fragment goes on strike, which can make work-sharing or technological change more difficult to accommodate, and so on. Accordingly, while smaller sub-divisions may be appropriate in the context of a particular case, and may be necessary to facilitate organizing (despite the collective bargaining "downside" described above), a broader, more comprehensive unit will *also* generally be appropriate. In other words, if a trade union seeks a *more* comprehensive bargaining unit, this larger unit will usually be appropriate, and will very likely be accepted on the *Hospital for Sick Children* test, unless there are serious labour relations problems with it which *demonstrably* overwhelm the difficulties associated with fragmentation, or unless the larger unit applied for seems idiosyncratic or perverse. Indeed, unless the labour relations context is quite unusual, one would expect the more comprehensive bargaining unit to be presumptively appropriate, if that is what the union has organized and applied for; and it serves no purpose to engage in the exercise mentioned in the emphasized portion of the *Hospital for Sick Children* case reproduced at paragraph 18.

17. Counsel on behalf of the employer argued that the two divisions in this case were separate businesses and should be treated as such for the purposes of collective bargaining. In support of his position counsel referred the Board to *Magna International Inc.*, [1981] OLRB Rep. Sept.

1260; *Usarco Limited*, [1967] OLRB Rep. Sept. 526; and *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250. All of these cases define an approach to resolving bargaining unit issues which existed prior to *Hospital for Sick Children*, *supra* and they do not start with the assumption that as long as the bargaining unit sought by the union does not generate serious labour relations difficulties for the employer, it will be granted the unit it applies for. Within the context of serious labour relations problems, the Board considers such issues as community of interest, interchange of employees and fragmentation and these cases may still be relevant when the Board is considering such issues. However the facts of the case before us do not demonstrate that the granting of the bargaining unit applied for by the union would create serious labour relations problems for the employer. In fact, the reverse appears to be true. While the two divisions reflect separate businesses, there is no doubt that they are inter-connected and that the enterprise as a whole is one organization. The organizational structure reflects this as does the daily work flow and employee interchange.

18. For all of the reasons outlined, the Board finds the following to be a unit of employees of the employer which is appropriate for collective bargaining:

All employees of Insulec Ltd. at its Unipac Division located at 145 Edward Street in the Town of Aurora and at its Insulec Division located at 125 Edward Street in the Town of Aurora save and except Supervisors, persons above the rank of Supervisor, office, clerical and technical staff, Engineering and Sales Staff.

Clarity Note: The parties further agree that office and clerical staff include the administrative staff and technical includes the Laboratory Technicians, Quality Assurance Technical Staff, Chemists and Production Scheduling Assistants which are all excluded from the Unit.

19. The Board is satisfied that the union has filed membership evidence demonstrating that more than fifty-five per cent of the employees of the employer in the bargaining unit set out above were members of the union on November 26, 1993, the certification application date.

The Petitions Issue

20. As already noted, the second issue before the Board in this case concerns the voluntariness of the individual petition documents which were filed in a timely manner with the Board. The *Board's Rules of Procedure*, Rule 50 provides as follows:

50. The Board may require that evidence of objection or evidence of re-affirmation be proven to be a voluntary expression of the wishes of the employees. The Board may decide an application without considering the evidence of objection or evidence of re-affirmation of any employee who does not appear at the hearing in person or by a representative and present evidence that includes testimony from his or her personal knowledge as to the circumstances of the written evidence, including how it was created and the way in which each signature on the document was obtained.

21. Although the wording in the current *Rules of Procedure* is somewhat different from the wording of previous incarnations, the intent is the same. The onus lies with the objecting employees to prove, on the balance of probabilities, that the documents filed with the Board represent the true wishes of the employees who signed them. To meet this onus, the petitioners must present the Board with evidence based on first-hand knowledge as to the circumstances under which the petitions came to be created and the way in which each signature on the documents were obtained. In other words, prior to concluding that a petition or petitions are voluntary the Board must be satisfied concerning the origination, preparation and circulation of the documents. In *Radio Shack*, [1978] OLRB Rep. Nov. 1043 the Board outlined the reasoning behind this requirement:

24. The Board has long held that there is an onus on a party relying on a statement of desire in

opposition to an application for certification to establish that the “sudden change of heart” by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board’s approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC 16,264 in the following terms:

“In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate or impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.”

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd.* and *Canadian Paperworkers Union*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.)

22. It is also helpful to review the Boards comments in *Conference Cup Company Limited*, [1986] OLRB Rep. Jan. 72, at paragraphs 13 and 14:

13. The Board must be satisfied, however, that when these union supporters sign the document indicating an apparent change of heart, they were doing so voluntarily, and were not motivated by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer, or could result in reprisals. It must be clear that the circulation of the petition is free from the actual or perceived influence of management. Often, as in the present case, a statement of opposition will be signed by employees who have indicated their support for the union only a short time before, and a natural question arises as to what prompted the change of heart. Was it prompted by a reappraisal of the value of collective bargaining, or by a reluctance to identify oneself as a union supporter when presented with the opposition document? While an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a document opposing the union.

14. Frequently, as in the present case, such documents are openly circulated on or near the employer’s premises, or during working hours, by employees who, in their opposition to the union, will be objectively aligned in interest with their employer and may be perceived to be acting on its behalf. In these circumstances, an employee may sign the document because he fears that refusal to do so will expose his support for the union and will be made known to his employer. Similarly, an employee may be motivated to sign because of conduct which suggests that continued support for the union will result in the loss of his job or other adverse employment consequences. In neither case can one regard his signing the petition as being truly voluntary - although, of course, the mere identity of interest between the employer and the objecting employees is obviously not sufficient in itself to link the petition with management in the minds of reasonable employees, or undermine the reliability of the signatures placed on it. There must be more than that, and each case must be considered on its own merits. But, in the Board’s experience there are enough instances where employers have committed unfair labour practices,

or have sponsored or supported anti-union petitions that these employee fears cannot be discounted as being patently unreasonable.

23. In turning to the specifics of the case before us, we would observe that although much of the evidence placed before the Board was not in dispute, contradictory evidence was put before the Board with regard to some events. For the purposes of deciding this case, it is not helpful or necessary to resolve many of these conflicts. What follows, except as specifically noted, are our factual conclusions.

24. The driving force behind the creation and collection of the individual petitions was Mr. Greg McDonald. Mr. McDonald is employed as a trainer and as such he organizes internal and external programs with regard to the company's products, the operation of machinery, testing procedures, standards and safety in both divisions. He works with employees from both divisions. Mr. McDonald heard of the union's organizing drive on Thursday, November 18, 1993, and signed a membership card the same day.

25. On Saturday, November 20, 1993, Mr. McDonald went to the Aurora Public Library to do some research on unions and certification applications. It was in the course of this research that Mr. McDonald learned about petitions, what needed to be included in a petition, the possibility of a vote, and specifically that it was the Board's practice to white out the names and any other identifying information from the petitions it received and to then send a copy of this altered document to the parties. According to Mr. McDonald, he obtained this information from a labour law text although he could not remember the author's name. In response to a question concerning whether he obtained information from the Board directly, Mr. McDonald indicated, as he put it, "Yes, they have many pre-recorded lines with answers". Mr. McDonald did not obtain a copy of the Guide to the Act available through the Board. Mr. McDonald also obtained information from his room-mate and, in his words, "various people". When pressed in cross-examination to reveal who these people were, Mr. McDonald was quite evasive and vague. As a result of his research and conversations with others, Mr. McDonald changed his mind concerning the union.

26. The following week Mr. McDonald organized opposition to the union's membership application. He organized two meetings of employees of the company, one in each division. None of the witnesses who testified could remember the exact date of these meetings, but it appears that they took place on either November 22, 23 or 24, 1993. Mr. McDonald normally works the day shift from 7:30 a.m. to 4:00 p.m., although due to his duties, Mr. McDonald's hours are somewhat flexible. On the day of the meetings, Mr. McDonald reported to work and around 8:30 a.m. began to approach employees in the Unipac division at their work stations or machines to discuss the union and his opposition to the union. These discussions took place during working hours.

27. Mr. Scott Rew, the receiver in the Unipac division, was also circulating amongst the employees in the Unipac division in the morning. It appears that he was collecting signatures on a list which he had on a clipboard. Mr. Rew's evidence was extremely vague with regard to this list. For example, he could not remember if there was a heading on the list although he thought he might have put the heading "We the people are against the Union". Mr. Rew also seemed confused concerning why people were signing the list. He indicated at one point that people were to sign the list "who didn't know about the union" and at another point that he was "asking people to sign if they were opposed to the union, if they wanted nothing to do with it". He indicated that he didn't know what he intended to do with the list and at another point that he didn't intend to do anything with the list. In addition to collecting signatures Mr. Rew testified that he was also approaching employees to find the source of a rumour that he had signed a union membership card.

28. At approximately 10:15 the same morning, Ms. Lorraine Dalrymple, a bargaining unit employee, was assisting a machine operator, Van T. Duong. Another employee, Mr. Robert Schaefer, was packing for Mr. Duong. Scott Rew came over to speak to Mr. Duong and Mr. Schaefer went to the shipping area, where he spoke to Mr. McDonald. Mr. Duong then joined Mr. McDonald and Mr. Schaefer. While both men were away from the machine, Mr. Bill Townsend, the supervisor on that shift, came over to it. Ms. Dalrymple pointed to the shipping area where the three men were talking and indicated that until the packer, Mr. Schaefer, returned the machine couldn't run as there was material that needed to be packaged. Ms. Dalrymple requested that Mr. Townsend go get Mr. Schaefer, and in her words Mr. Townsend replied that "he didn't want to know about it and couldn't get involved and walked away".

29. A few minutes later Mr. McDonald utilized the internal paging system to invite employees to attend a meeting in a central area of the Unipac plant. Machines were shut down and all of the Unipac bargaining unit employees attended the meeting. It is not necessary to review in detail what took place at the meeting. Mr. McDonald with Mr. Rew at his side, addressed the employees and told them of his concerns with regard to the union and his opposition to the union. Mr. McDonald was quite upset and admitted that he was screaming and yelling at the employees. Mr. McDonald indicated to the employees that if they wanted to change their minds with regard to the union, he knew of a way that they could do this. He indicated that they could speak to him about it.

30. Shortly after this meeting in the Unipac division, Mr. McDonald and Mr. Rew walked over to the Insulec division. As there are fewer employees in that division, Mr. McDonald approached each of them individually and asked them to attend a meeting. All of the employees attended the meeting and all of the machines except for two were shut down. The second meeting was held on the premises in a room referred to as the tower room and Mr. McDonald gave his speech again. Once again, he was angry and upset and indicated to the employees that if they wished to change their minds about the union he could assist them. Several employees who had signed union cards spoke to him at the end of the meeting.

31. Mr. McDonald indicated that he did not notify anyone in management that he would be conducting these meetings and did not obtain permission from anyone to tell the employees to shut down their equipment during working hours to attend the meetings. While the meetings were going on, no one from management was around to observe the meetings. All of the witnesses agreed that it was unusual to shut down the machinery such as was done in this situation, in the middle of the shift to facilitate attendance at a meeting. In cross-examination Mr. Hogarth admitted that he could not recall an instance where all of the machines were shut down for a meeting. He indicated that normally the machines are shut off individually to enable repairs to be performed or to allow for maintenance or in the event of production difficulties.

32. Mr. McDonald prepared sample draft petition documents for employees to review and use as a guideline in the preparation of a petition. With the exception of his own petition, all of the individual petitions were prepared, signed and collected on the company's premises. Three were prepared and signed in the lunchroom, one in the washroom, two in Mr. McDonald's office and two while employees were operating their machines. With the exception of Mr. McDonald's petition and the one petition prepared in the washroom all were prepared and signed during working hours.

33. The Board heard evidence from the two individuals who prepared and signed their petition documents in Mr. McDonald's office, from one of the employees who prepared and signed a document while operating his machine and from the employee who prepared and signed a docu-

ment in the washroom. Mr. McDonald was not actually with the latter three individuals when they prepared the petition documents, nor did he actually witness their signatures. The two individuals who signed in Mr. McDonald's office were approached by him while they were working. This occurred immediately after the lunch break. After the two individuals indicated a desire to execute a petition he told them he would get permission from their supervisor for them to shut off their machines and come to his office. In examination-in-chief, Mr. McDonald indicated that he told the supervisor that he was conducting a brief training seminar on the position held by one of the individual's and needed to speak to the two men in his office. In cross-examination he indicated that he told the supervisor that he needed to talk to the two individuals for fifteen minutes concerning "up and coming" training on a particular topic. In any event, after speaking to the supervisor, he returned to the two employees and asked them to come to his office. They shut down their machines and accompanied him to his office where they prepared and signed petition documents.

34. The Board heard conflicting evidence concerning the possible involvement of Mr. Hogarth in the events surrounding the collection of names by Mr. Rew, the collection of statements of desire by Mr. McDonald and a conversation with a particular bargaining unit employee. It is neither necessary to set out this evidence nor to assess the credibility of the various witnesses on these matters to reach a conclusion concerning the voluntariness of the petition documents currently before the Board, therefore we decline to do so.

35. Whether members of management actually knew about the origination and circulation of these statements in opposition to the union is not the issue that concerns the Board in this case. What is of concern is whether a reasonable employee, based on the events which occurred on either November 22, 23 or 24, 1993, could have concluded that whether he/she signed a petition would come to the attention of management.

36. We have concerns in this case with regard to Mr. McDonald's evidence that he obtained detailed information concerning the Board's practices and procedures from an unidentified labour law text in the Aurora Public Library and from pre-recorded information lines at the Ontario Labour Relations Board. No such information lines exist, therefore it is highly unlikely that Mr. McDonald obtained detailed information in the manner he suggests. In addition, we have reservations about: the evidence of Mr. Scott Rew, especially with regard to the purpose of the document prepared and circulated by him; the fact that Mr. Rew and Mr. McDonald approached employees at their work stations early in the workday and then later, after virtually shutting down operations, held meetings with staff on company time; the unchallenged evidence of Ms. Dalrymple regarding Mr. Townsend's turning of a blind eye to the activities of Mr. McDonald; and the manner in which the statements of desired were prepared and signed. In assessing the evidence we have looked at the internal inconsistencies in some of Mr. McDonald's and Mr. Rew's evidence, the self-serving nature of some of the evidence, the witnesses' ability to recall what happened and what is reasonably probable in all of the circumstances.

37. After carefully reviewing the evidence before us we cannot conclude that the statements of desire filed with the Board reflect the voluntary wishes of the employees who signed them.

38. The only remaining issue concerns whether Mr. Joe DaSilva was an employee of the company at the relevant time and therefore properly included on the list of employees that make up the bargaining unit. However, the Board has determined that the applicant's right to certification cannot be affected by the Board's ultimate decision as to the inclusion or exclusion of Mr. DaSilva from the list of employees. Therefore, in accordance with the Board's decision in *Robin Hood Multifoods Inc.*, [1985] OLRB Rep. July 1159 it is appropriate for the Board to issue a final certificate for the following bargaining unit:

Bargaining Unit #1

All employees of Insulec Ltd. at its Unipac Division located at 145 Edward Street in the Town of Aurora and at its Insulec Division located at 125 Edward Street in the Town of Aurora save and except Supervisors, persons above the rank of Supervisor, office, clerical and technical staff, Engineering and Sales Staff.

Clarity Note: The parties further agree that office and clerical staff include the administrative staff and technical includes the Laboratory Technicians, Quality Assurance Technical Staff, chemists and Production Scheduling Assistants which are all excluded from the Unit.

3272-93-JD Ontario Sheet Metal Workers' & Roofers' Conference Sheet Metal Workers' International Association, Local 397, Applicant v. Lakehead Roofing and Sheet Metal Co. (1983) Ltd.; United Brotherhood of Carpenters and Joiners of America, Local 1669, Responding Parties

Construction Industry - Jurisdictional Dispute - Sheetmetal workers' union and carpenters' union disputing assignment of work on wall system for housing project - Board finding that handling and installation of bitheruthene waterproofing membrane, z-bar and insulation at project in Thunder Bay properly assigned to sheetmetal workers

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *W. N. Fraser* and *G. McMenemy*.

APPEARANCES: *J. Raso* and *Tim Fenton* on behalf of the applicant; *David McKee* and *Kauko Niemi* on behalf of the United Brotherhood of Carpenters and Joiners of America, Local 1669; *Steve Teale* on behalf of Lakehead Roofing and Sheet Metal Co. (1983) Ltd.

DECISION OF THE BOARD; March 23, 1994

1. This is an application concerning a jurisdictional dispute filed pursuant to section 93 of the *Labour Relations Act* by the Ontario Sheet Metal Workers' and Roofers' Conference and the Sheet Metal Workers' International Association, Local 397 ("the Sheet Metal Workers") against Lakehead Roofing and Sheet Metal Co. (1983) Ltd. ("Lakehead") and the United Brotherhood of Carpenters' and Joiners' of America, Local 1669 ("the Carpenters"). This application was filed on December 16, 1993.
2. The Board held a consultation with respect to this application on March 21, 1994. When the consultation concluded on that day, the Board advised the parties that it would reserve its decision in order to permit the panel members to review the material filed with the application in light of the representations made.
3. The nature of this dispute can be briefly summarized as follows. The work in dispute involves certain work performed on a wall system for a 150 unit seniors' housing project. The interior and exterior positions of the wall system were installed by different contractors and most of this work was assigned to members of the Carpenters. Lakehead obtained a contract from George Stone & Sons Ltd. for the installation of the middle portion of the wall system which consisted of installing a bituthene waterproofing membrane (W. R. Grace product), z-bar and rigid insulation over drywall. Lakehead assigned this work, which constitutes the work in dispute, to roofers and

sheet metal workers. The Carpenters claim that the work in dispute should have been assigned to its members. Lakehead also obtained a contract on this project to perform sheet metal and roofing work which included the installation of the bituthene membrane.

4. After reviewing the material filed and after considering the representations that the parties made at the consultation on March 21, 1994 in light of the usual factors the Board utilizes in deciding work assignment disputes, the Board hereby makes the following determination:

The handling and installation of a bituthene waterproofing membrane, z-bar and insulation at the Senior Citizens' Home Project in Thunder Bay was properly assigned to roofers and sheet metal workers.

2406-93-R United Food and Commercial Workers International Union, Local 633, Applicant v. Longo Brothers Fruit Markets Inc., Responding Party

Bargaining Unit - Certification - Union applying to represent unit of meat department employees in grocery store - Employer submitting that "craft" unit not appropriate because employees no longer exercising technical skills distinguishing them from other employees within meaning of section 6(3) of the Act - Board finding union's proposed unit appropriate - Certificate issuing

BEFORE: *Jules Bloch*, Vice-Chair, and Board Members *R. W. Pirrie* and *R. R. Montague*.

APPEARANCES: *Harold F. Caley, John Fuller, Michael Duden, Brian Noonan* and *Gerry Brennan* for the applicant; *Donald B. Jarvis, Anthony Longo, Mike Buick, Dominic Simonetta* and *Rob Morgan* for the responding party.

DECISION OF THE BOARD; March 9, 1994

1. This is an application for certification.
2. The Board finds the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.
3. At the commencement of the hearing the responding party submitted that the bargaining unit applied for by the applicant was no longer a "craft" unit pursuant to section 6(3) of the Act. Counsel submitted that the unit applied for only met two of the three criteria for "craft status", "in that these type of employees commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts". Counsel for the responding party submitted that the employees in the meat department of Longo Brothers Fruit Markets Inc. no longer exercise technical skills or are members of a craft by reason of which they are distinguishable from the other employees.
4. The applicant applied for their normal "craft" unit. This unit is described as: "all full-time meat department employees of Longo Brothers Fruit Markets Inc. in Burlington, Ontario, save and except manager and persons above the rank of manager".
5. The Board gave the parties a full opportunity to adduce evidence and submissions.

After receiving all the evidence and submissions the Board reserved its decision. The Board finds on the basis of all the evidence and submissions adduced before it that the meat cutters and wrappers at Longo Brothers Fruit Markets Inc. continue to exercise technical skills and continue to be members of a craft by reason of which they are distinguishable from the other employees. (See *Food City*, [1978] OLRB Rep. Sept. 826; *Huntsville IGA* [1982] OLRB Rep. Nov. 1637; *Dollo Bros. Food Market Limited*, [1986] OLRB Rep. Jan. 82; and *H. W. Gluck Limited*, [1987] OLRB Rep. Nov. 1395.).

6. The Board finds that “all full-time meat department employees of Longo Brothers Fruit Markets Inc. in Burlington, Ontario, save and except manager and persons above the rank of manager” to be a craft unit pursuant to section 6(3) of the Act.

7. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the responding party in the bargaining unit on October 8, 1993, the certification application date, had applied to become members of the applicant on or before that date.

8. A certificate will issue to the applicant.

0468-93-R; 1150-93-U; 2243-93-U IWA - Canada, Applicant v. Madawaska Hardwood Flooring Inc., Responding Party; Stephen Perry, Kevin Cruise, Lorrie Gauthier, Marcel Mathieu, Ken Rekowski, Applicants v. IWA - Canada, Responding Party v. Madawaska Hardwood Flooring Inc., Intervenor

Certification - Charges - Intimidation and Coercion - Fraud - Membership Evidence - Reconsideration - Unfair Labour Practice - Following union's certification, certain employees making unfair labour practice application complaining about manner in which fellow employee collected membership evidence - Employer also seeking reconsideration of certification decision - Board hearing evidence of nine persons and resolving conflicting evidence in favour of union's witness - Board finding that employee collector did not contravene Act when he approached employees to obtain membership evidence - Employee collector's actions not causing Board to conclude that filed membership evidence unreliable - Applications dismissed

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *R. W. Pirrie* and *H. Peacock*.

DECISION OF THE BOARD; March 8, 1994

1. The three applications referred to above came on for hearing on October 18, 1993. Since the IWA-Canada was prepared to adjourn its section 91 application, the Board proceeded to deal only with the application for reconsideration and the section 91 application filed by certain employees.

2. In a decision dated November 15, 1993, the Board provided the parties with the following decision:

1. The Board has before it an application for reconsideration by Madawaska Hardwood Flooring Inc. (“Madawaska”) in Board File No. 0468-93-R. The Board also has before it a section 91

application made by certain employees of Madawaska alleging certain violations of the *Labour Relations Act*.

2. During four days of hearing beginning on October 18, 1993, the Board entertained the evidence and representations of the parties relating to these two applications. Having regard to the evidence and the representations, the Board finds it appropriate to dismiss the application for reconsideration and the section 91 application made by certain employees. Our reasons for this decision will follow in due course.

Our reasons for the above decision are set out below.

3. To appreciate the nature of the proceedings, it is useful to refer to some of the history concerning the certification application. On May 10, 1993, the IWA-Canada filed an application for certification for a unit of employees employed by Madawaska Hardwood Flooring Inc. ("Madawaska"). On May 31, 1993, the parties to the certification application agreed to waive the hearing and the Board (differently constituted) certified IWA-Canada by decision dated May 31, 1993 which was sent to the parties with a covering letter dated June 2, 1993. On June 4, 1993, the Board received by facsimile petitions signed by employees at Madawaska as well as individual statements signed by certain employees expressing opposition to IWA-Canada and containing certain allegations relating to the collection of membership evidence. The Registrar responded by letter of June 10, 1993 and, in effect, advised that the Board was unable to consider the petitions that were filed late and made reference to section 91 of the *Labour Relations Act*. On June 30, 1993, certain employees filed a section 91 application in which they complained about the manner in which Rick Criuse, a fellow employee, collected membership evidence. This was followed on August 3, 1993 by Madawaska's request for reconsideration of the decision issuing the certificate to IWA-Canada. In making its reconsideration request, Madawaska relied on the allegations made by the employees who filed the section 91 application as well as some additional allegations against Mr. Criuse.

4. In support of its application for reconsideration, Madawaska called seven witnesses to testify. Mr. Capiieski, an employee who represented the applicants in the section 91 application, did not call any evidence. The IWA-Canada called two witnesses. In making its factual determinations, the Board has carefully reviewed all of the evidence and the parties' submissions relating thereto.

5. With the exception of his own membership card, Mr. Criuse signed as collector on all of the applications for membership filed in support of this application. He collected the membership evidence on May 7 and 8, 1993. A number of persons were called by Madawaska to testify about what Criuse said when he sought their support. Criuse also testified about these conversations and there is some material differences between what he said and the evidence of the Madawaska witnesses. By using the usual factors to resolve conflicting evidence, the Board is satisfied that Criuse was a credible witness and prefers the evidence he gave where his evidence conflicted in a material way with the evidence of other witnesses. By saying we believe Criuse and found his evidence more probable in the circumstances does not mean that we found the Madawaska witnesses to be untruthful. Rather, it is more likely that they misinterpreted what they were told.

6. K. Rekowski testified that Criuse told him that signing a card only represented an expression of interest in the union and that the issue would come down to a vote. Criuse stated that he told employees, including Rekowski, that he was going for automatic certification and that if he did not obtain sufficient support there would be a vote. Rekowski was the only witness to testify that Criuse told him there would ultimately be a vote. The Board has difficulty in accepting Rekowski's evidence on this point and finds it probable that Rekowski misunderstood what Criuse told him. The Board is satisfied that Criuse did not misrepresent the certification and card signing process.

7. Steven Perry testified that Criuse told him that he might not be protected if he did not sign a union card. Perry also stated that Criuse told him he was not leaving until he obtained his signature. According to both Perry and Criuse, Criuse was concerned that if Perry did not sign, Perry would tell other persons about Criuse's role which might impact on Criuses' employment. Criuse testified that he told employees that they would pay union dues even if they did not sign and that the union would still help them. G. McGregor confirmed that Criuse told her she would pay dues even if she did not sign and that the union would still have to represent her. In reviewing Perry's evidence, the Board cannot be satisfied that Criuse told Perry that his failure to sign might affect the way in which the union would represent him. Nor do we find Criuse's comment that he would not leave until he had obtained Perry's signature conduct which would unduly influence a reasonable employee.

8. Criuse approached L. Gauthier at her home on May 8, 1993 and asked her to support the union. P. Murdock, Gauthier's fiancée, who was present for most of the conversation, was called to testify about the conversation since L. Gauthier had passed away prior to the hearing. Murdock stated that Criuse told Gauthier that if she did not sign, she would not have all the benefits of the union. Criuse denied saying any such thing and we accept his evidence in this regard.

9. A number of employees testified that Criuse advised them that he had signed most of the employees in the unit and that they subsequently discovered this to be untrue. Rekowski said Criuse told him he had signed a hundred percent. McGregor and Jodda testified that Criuse told them he had signed ninety percent of the employees. Mathieu testified that Criuse told him that everyone signed and he was the last one. Murdock stated that he and Gauthier were told all of the employees had signed except for two. Criuse testified that he did not advise any employee what level of support there was for the union at any point in time. He said he often did tell persons that every one he had approached had signed if this was true. By the time he got to Gauthier's, he could only say that every one he approached had signed except for two. In his evidence, Perry confirmed that Criuse told him that all of the persons he had contacted before him had signed. Upon review of all of the evidence given relating to this allegation of misrepresentation, the Board prefers the evidence of Criuse. We are satisfied that Criuse only talked to employees in terms of who he had approached and not in terms of the entire bargaining unit.

10. Two witnesses testified that Criuse made comments about the owner selling the business. McGregor said Criuse told her the owner was selling the plant and if the plant was sold the new owner would be required to respect the contract and the employees would not lose their jobs. Murdock testified that Criuse told Gauthier that Madawaska was to be sold, that there was a potential buyer and that employees could then lose their jobs without a union. The owner, Mr. Staples, testified he had no plans to sell the company. Criuse testified that he had heard from another employee that Mr. Staples may have a potential buyer for the plant. Criuse stated that he told some employees that if the plant was sold and the union was not there, the new owner did not have to recall all of the employees. Criuse also told employees that any new owner would have to take over a union contract if a sale occurred within a year of the plant closing. The statements by Criuse about the plant closing constitutes salesmanship and not false representations that would cause us to have some concern about the way in which Criuse obtained membership evidence. If any employee had any concerns regarding this aspect of the sales pitch, they could have easily made inquiries on their own to ascertain their validity.

11. In summary, the Board finds that Mr. Criuse did not contravene the Act when he approached employees to obtain membership evidence, nor did he act in any way which would cause us to conclude that the membership evidence that was filed was unreliable. It is for these rea-

sons that the Board dismissed Madawaska's application for reconsideration and the section 91 application filed by employees.

12. Having regard to the circumstances, the IWA - Canada application in Board File No. 2243-93-U is withdrawn with leave of the Board.

3555-93-R United Food and Commercial Workers International Union, AFL-CIO-CLC, Applicant v. Mar-Brite Foods Co-operative Inc., Responding Party

Bargaining Unit - Certification - Employer agricultural co-operative owned by 300 apple and tomato farmers - Co-op operating plant involved in squeezing and canning apple and tomato juice - Employer submitting that its employees employed in agriculture and that *Labour Relations Act* not applying - Board finding that cannery employees not employed in agriculture - Employer seeking to exclude seasonal workers from union's proposed all-employee bargaining unit where application not brought "in season" - Board finding union's proposed all-employee unit appropriate - Certificate issuing

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *W. H. Wightman* and *K. Davies*.

APPEARANCES: *Michael Klug* and *John Fuller* for the applicant; *Barry Brown* for the responding party.

DECISION OF K. G. O'NEIL, VICE CHAIR AND BOARD MEMBER K. DAVIES; March 9, 1994

1. This is an application for certification in which there are two outstanding issues: are the employees the union seeking to represent employed in agriculture and, if not, should the bargaining unit include seasonal workers when the application was not brought "in season"?
2. The facts outlined below, which are not substantially in dispute, are based on the evidence of *Hector Delanghe*, the co-op's secretary treasurer, and *Don Fuller*, a union organizer.
3. Mar-Brite is a co-operative owned by 285 apple farmers and 14 tomato farmers, located near Leamington, Ontario. Its members' farms are situated from Windsor to the Quebec border. The members are bound together by agreements which describe the quantity of shares each owns and the obligations of the producer to supply, and the co-op to purchase product. Individual farmers, rather than the co-op are responsible for the cost of transporting product to the co-op. Shares are not transferable on the open market; they may be returned to the co-op for future purchase from the co-op by another producer. Each farmer, regardless of the size of shareholding, has one vote. These arrangements are considerably different than many arrangements with commercial canneries where the farmer is not able to require the purchase of his product, and/or is not obliged to supply. The co-op has been recognized as an agricultural co-op by the federal government for funding and taxation purposes, because of the fact that it is owned by farmer producers.
4. Mar-Brite is the only plant in Ontario that squeezes and cans apple juice. Other plants squeeze the juice and tanker it out to be canned in the States to be brought back for sale in Ontario. The co-op also cans tomatoes and tomato juice. Except for a small orchard around the

plant, all the orchards and farms supplying product to Mar-Brite are geographically separate from the plant property.

5. Mr. Delanghe grows both tomatoes and apples and gave evidence about aspects of his farming operation, which in his view includes the processing functions performed at Mar-Brite. Making juice from apples is the largest part of Mar-Brite's work, and Mr. Delanghe explained that he also does juice or cider making on his farm. It is because of the high cost of pasteurizing equipment that the farmers formed a co-op to make the juice, which has a longer shelf life than cider. Juice is made from apples which do not have the appropriate size or quality for table apples, which are prepared directly for market on the farm, and are not part of Mar-Brite's operation.

6. For the twenty years prior to 1991, Mr. Delanghe sold his juice apples to a company known as Olinda Foods. When it became clear that it was in receivership and going bankrupt, and he stood to lose a local place to process his product, Mr. Delanghe and other farmers banded together to form a co-op. They were then eligible for federal funding to assist with both the purchase and operation of the co-op. They bought the Olinda Foods plant and continue to operate it as a cannery. Olinda, because it was not a producer owned outfit, was not eligible for the same type of federal funding.

7. Four employees originally from Olinda, who had been hired to operate it for the receiver, stayed on to manage the canning operation for the co-op. Three of those are still with the co-op. The directors and shareholders of the co-op are not involved in the day-to-day operation of the co-op, but the five managing directors may be there once a week or more to keep informed. During pack season, Mr. Delanghe for example, would spend five to ten hours a week at the cannery. Communication with the cannery increases in general during pack season, as farmers call to schedule their delivery of produce.

8. In the area of labour relations, they give advice to the Production Leader, Gerry Dericks, but are not involved in day-to-day management of the employees. The co-op employs approximately 15 people year round, and about 50 in pack season, which generally lasts from early August to early December. Because there is traditionally a shortage of Canadians available for packing jobs, seven to thirteen of these have been Mexican workers whose employment is arranged through a program associated with the federal Immigration Department. Fluctuations in the labour force outside of pack season are short-lived and related to rush orders or perhaps replacement for sickness or vacation.

9. The work the employees do is centred around a conveyor belt canning operation, and the work for the seasonal employees is similar to that of the year-round employees.

10. The union's witness gave evidence that there are at least two canneries in Ontario who have bargaining units which include all employees, and do not exclude seasonals. The evidence did not indicate whether the applications were brought during packing season or not. There was an application for certification for Mar-Brite employees by the current applicant which was made and withdrawn in the fall of 1993, during pack season. The employee complement at the time was in the vicinity of 35 and the union had approximately 26 cards as their membership evidence.

11. As to the process of organizing seasonal workers, Mr. Fuller said that it was hard to convince them that organizing a union was in their interests until they had been back for more than a season or two.

Are these employees employed in agriculture?

12. Section 2(b) provides that the *Labour Relations Act* does not apply to a person employed in agriculture, except as may be prescribed by regulation. There is no regulation applicable to Mar-Brite's operations. Thus, if the employees of Mar-Brite are employed in agriculture the application must be dismissed.

13. Employer counsel argued that the work of the employees at Mar-Brite should be found to be agricultural. Although they are not doing field work, he says their work is post harvest processing which is an integral part of the farming operation of each of the farmers who are shareholders in the co-op. It is an extension of the farm. Counsel argues that this is no less a part of the agricultural operation than the weighing, grading and waxing of apples on a farm. The fact that the farmers have pooled their resources to let each make pasteurized juice and retain ownership and control, should not change the character of the work, in counsel's submission.

14. The fact that the cannery is physically separate from the farms of its owners should not change anything either says counsel. Counsel underlines that it is the nature of the work that must be determinative. The production of food is what agriculture is, argues counsel, and this is part of that. Counsel says that a sensible definition of agriculture includes a range of activities both before and after planting and harvesting, such as the purchase of seeds, weighing and transporting goods. No farmer gets paid until delivery to a market or a consumer. What he does to ready the product for market or consumption is integral to the agricultural enterprise. Counsel suggested that once the farmer turned the product over to someone else, that the work involved with the produce would cease to be agricultural. As long as the work is done by the farmer, or under the producer's control, the Board should consider it to be agricultural. Counsel suggested that the only difference between the juice Mar-Brite sells to a grocery store and the cider a farmer sells at his farm gate is that a number of farmers have gotten together to do the same function as the single farmer with the cider. This is not merely a question of ownership, says counsel, but something which should characterize the work.

15. Counsel referred to and distinguished *Ontario Tree Fruits Co-operative Limited*, [1962] OLRB Rep. March 411, *Federal Farms Limited*, [1963] OLRB Rep. October 341, and *Sunnylea Farms*, [1980] OLRB Rep April 530. He noted that, as opposed to the plants in those cases, Mar-Brite processes almost exclusively the product of its member owners. Further, he asks the Board to reject the analysis of those cases to the extent that it suggests that agriculture is limited to the cultivation of the ground. Counsel submits that there is a false dichotomy in the earlier cases between work in the field and functions involved in preparation for market, all of which are integral to agriculture. He suggests that the analysis of the Board in *Wellington Mushroom Farm*, [1980] OLRB Rep. May 813, which goes a long way to dispelling the myth of the bucolic family farm, is preferable. In that case the "industrial look" of the operation did not take away from the fact that the work was agricultural in nature.

16. Counsel submits that the fact that the federal government has recognized the co-op as agricultural, producer owned, supports the co-op's argument, since it can be inferred that the recognition of the co-op as eligible for farm financing reflects a policy decision that it is part of the farm.

17. Counsel for the co-op argues that one of the policy reasons for the exclusion of agriculture from the scheme of the *Labour Relations Act* is the fact that there is a point in time where the farmer is catastrophically vulnerable to strikes. It is the position of the co-op that this is no different for the canning end of the operation, which is just as valuable to the farmer as getting the apples off the tree, and is a basis on which the Board should find that this is agriculture.

18. The union says that whatever would be the case if the canning were done on the farm, this cooperative is running an industrial canning plant. Its employees are not employed in agriculture, says the union; the ownership structure should not determine the result.

19. Union counsel says the true test is whether the work is integral to an agricultural operation, as dealt with in *Sunnylea Foods*, and *Federal Farms*, both cited above. The most important question, submits counsel is: what do the workers do? There is no dispute that they do industrial, conveyor belt canning work and packing. Cannery workers are not excluded by the Act, nor are employees of co-operatives.

20. Further the union argues that the Bill 40 amendments to the Act in 1993 add further elements to the Board's determinations which weigh in favour of the union's position. The amended purpose clause, for example, directs the Board to encourage collective bargaining so as to enhance employees' abilities to negotiate. As well, the legislature has announced its intention to provide a collective bargaining regime for agricultural workers.

21. Union counsel suggests that the limit proposed by the co-op, that work ceases to be agriculture when the farmer loses control over the produce, is not clear enough, nor the question the Act poses. The exclusion is not for employees of farmers, but for persons employed in agriculture. On the test the employer proposes, grain mills, grocery stores or manufacturers of farm equipment owned by farmers would be indistinguishable from the farm itself for the purpose of the Act. Counsel underlines that the agricultural exclusion was not framed to exclude "agribusiness" and all its works, and that it should be interpreted narrowly in light of the amendments to the Act.

22. Union counsel referred to the same cases as employer counsel, and argued that they supported the union's position and should be followed. The union relies on the definition of agriculture that the Board used in *Ontario Tree Farms*, cited above.

23. The union draws particular attention to the evidence that the farmers are not the experts in canning. They retained the services of the people who ran the earlier Olinda operation in the same plant. Counsel says it is also significant that the co-op is a separate legal entity from the individual farmer, despite the cooperative nature of the enterprise.

24. Employer counsel argued in reply that it was important that Bill 40 retained the agricultural exemption, and that the legislation being proposed was not a repeal of that exemption, but the creation of an entirely separate regime, a renewed recognition of the necessity of separate treatment for agriculture.

25. We agree with employer counsel that the fact that the cannery is physically separate from the farms of its owners is not determinative. Nor is the fact that more than one farmer operates it. Otherwise, a farm with fields physically separate from each other, or owned by more than one person would somehow lose its character. It must be, as both counsel agreed, the nature of the work which determines the result in this matter.

26. We have carefully considered the arguments of both counsel as to the appropriate definition of agriculture. We not think it is necessary here to conclusively define agriculture. Both counsel agreed that agriculture included a range of activities, and did not seek to restrict the idea to field employees. Perhaps the most useful test is whether or not the work in question is integral to the agricultural enterprise, a proposition that each counsel seemed to find useful to a greater or lesser extent. This is essentially a line-drawing exercise.

27. We are of the view that the facts of this case do not indicate that the employees are

employed in agriculture, although they are engaged in the processing of agricultural product. The concept of readying that product for market as part of the agricultural enterprise is one that is not unsound. However, it is clear that the co-op serves as an intermediate market itself, that the individual farmer does alienate his product at the point of sale to the co-op. The farmer is paid in co-op shares and cash for the product delivered. This supports the idea that the co-op's cannery is a separate and severable enterprise from the farm operation. The ownership by the farmer producers is the only aspect of the facts which can support the exclusion of these employees as agricultural. The work itself is indistinguishable from other routinized, conveyor belt work which is clearly industrial, such as bottling or canning any liquid which is not a food produced by farmers. On balance, the view of cases such as *Ontario Fruit Trees*, cited above, seems correct and applicable to these facts. See also paragraph 8 of *Sunnylea Foods*, cited above. Co-operative ownership by producers, admirable and advantageous though it may be, does not actually convert this cannery, with all its industrial qualities, into an agricultural enterprise.

Should the bargaining unit be "all employee" or exclude seasonals?

28. Counsel for the co-op says that we should describe the bargaining unit in terms of the employees who were working when the application was brought since it is the employer's position that the seasonal workers deserve a say in whether they are organized. Since there were none working around the time of the application, it would be unfair to them to sweep them into a bargaining unit. Referring to *Melnor Manufacturing Limited*, [1969] OLRB Rep March 1288, counsel says the Board has an established practice to not include seasonals in a bargaining unit where the application is brought out of season, because they are not there to express their views. Counsel submits that that practice was reaffirmed in *Filkon Food Services Limited*, [1981] OLRB Rep. May 1771 and *R. J. R. MacDonald Inc.*, [1992] OLRB Rep. February 195. In the latter case, the season had clearly begun, although it was not full season.

29. Further counsel argues that the seasonal employees are a distinct group, as many are from out of the country, and have been hired on a fixed term or task. They have far less attachment to the workplace than the year round group.

30. We are urged to reject the idea that there is any relevancy to the evidence of membership in the previous application for certification. The employer is in no position to dispute it or gather information about it. No seasonal gave any support to the application currently before the Board. Membership support in an earlier application should not be able to affect the Board's earlier practice in any event.

31. The union, by contrast, says that the applicable Board practice is to certify for all employee bargaining units as a rule. Where a party is seeking to exclude a group, the onus should be on them to justify it, an onus which has not been discharged in counsel's view. Counsel says that it is difficult to see how the Board could find that an all-employee unit was not at least an appropriate unit, if not the most appropriate.

32. Counsel says that the practice that the employer refers to is really something that happened twice in twenty years, and is not something the Board should follow. As well, union counsel says that more recent cases seem to contradict them. Further, the union argues that any exception to the general policy of all-employee bargaining units should be rethought because it is not grounded in logic or standard Board practice. Although *Melnor Manufacturing*, cited above, refers to a practice, *Filkon's* reference is entirely obiter, and there is very little discussion of the issue at all. Further, counsel suggests that this seasonal policy is limited to the tobacco industry.

33. Referring to *Consumers Distributing Company Limited*, [1982] OLRB Rep. Jan. 26,

counsel submits the Board found that seasonal employees were not distinct. In *Spramotor Ltd.*, [1976] OLRB Rep. May 215, at paragraph 4, union counsel sees the Board as saying that if there ever was a policy about seasonals, it is gone. That is a clear statement that the Board does not see seasonal bargaining units as appropriate.

34. As a matter of principle under section 6, the union suggests there is no justification for the canning industry having seasonals excluded when other industries do not. The union submits that no distinction in community of interest has been demonstrated; the work is identical for seasonal and non-seasonal workers. Counsel also observes that the season is fairly long, five months of the year. As well, the Board's longstanding aversion to fragmentation, and the Act's intention to facilitate organization in previously unorganized sectors support the union's position. Counsel refers to *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330 for the latter position.

35. The union submits that if the Board has lingering doubts about the potential support among seasonal employees, that it is entirely proper to rely on the evidence filed in support of the earlier application. The seasonals are in need of the protections of collective bargaining, says counsel. Bill 40 intended to extend collective bargaining to just this sort of work force, and should not be ignored.

36. In reply, counsel for the co-op submitted that seasonal employees in a retail operation are an entirely different problem than seasonals in the tobacco and canning industries. The retail sector does not use offshore workers and special immigration provisions.

37. Since 1985, the test utilized by the Board in bargaining unit determinations has usually been the one set out in *The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266:

Does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer?

As the Board said in *General Signal Limited*, [1993] OLRB Rep. Nov. 1141, this test represents a change of emphasis, which developed in a context of experience which indicated that many different configurations could produce viable bargaining structures.

38. The test from *The Hospital for Sick Children* has gone hand in hand with the Board's longstanding and recently reaffirmed aversion to fragmentation. See, for example, *Sifton Properties Limited*, [1993] OLRB Rep. Oct. 1010, and *The Governing Council of the Salvation Army*, [1994] OLRB Rep. Jan. 85. When applied to the facts of this case, those tests would indicate that an all employee unit is an appropriate one. Although the seasonals will have some difference in community of interest, it is nowhere near large enough to necessitate a separate unit. There was nothing presented to the Board which would lead us to find that it is not viable. As to serious labour relations problems, none were shown. It was said that the foreign workers were a different problem than seasonal workers in the retail industry, but it was not suggested that their inclusion in an all-employee bargaining unit would pose structural obstacles to harmonious bargaining.

39. The practice the Board noted in cases referred to by employer counsel, the "tobacco and cannery exception", is one for which the rationale is not well articulated. In particular, the rationale for having seasonal fluctuations determine appropriateness in canning and tobacco, but no other industry, is lost to history. It is interesting to note that the policy was not used to exclude seasonals in any of the cases cited. In *Melnor Manufacturing Limited*, cited above, it is used to justify an all-employee unit, albeit on an application brought in season. In none of the other cases cited did either branch of the "tobacco and cannery exception" apply, and it was used merely to

underline the Board's general practice to make its bargaining unit determinations without regard to seasonal fluctuations, no matter how predictable.

40. We are aware that an all employee unit has the effect of giving the more permanent employees the right to decide concerning union representation for the seasonal employees. However, there is no indication in the evidence that the alternatives, which include an application brought in season, but close to its end, would be any more democratic. It might well mean that one year's seasonals decide for the next year's. Throughout the regime of the *Labour Relations Act*, it is recognized that it is impractical to include the wishes of future employees in a large range of circumstances as a number of cases such as *Consumers Distributing*, cited above, make clear.

41. In sum, we are of the view that the unit the applicant has applied for is an appropriate unit, and that the employer has not demonstrated that it would cause it serious labour relations problems. A certificate will issue to the applicant for its requested unit:

all employees of Mar-Brite Foods Co-operative Inc. in Leamington, save and except supervisors, persons above the rank of supervisors, office and clerical staff.

CONCURRING OPINION OF BOARD MEMBER W. H. WIGHTMAN; March 9, 1994

1. It is with regret, and considerable misgivings, that I concur.

2. My regret and misgivings flow from a concern as to the possible consequences for the cannery operation which would not exist even today had it not been for the inventiveness of growers who at once saved a number of cannery jobs while in the process of devising a means of coping with, among others, the high cost of pasteurizing equipment.

3. I believe the Board is entitled to take notice of the virtual disappearance of canneries over the years and the consequent shipping of product to canneries in the United States where value is added and the product returned to Canada for ultimate sale.

4. The initiative of these growers is of a type that will be necessary in the increasingly competitive agriculture sector if family-owned farms are to continue to exist. Whether the bargaining unit includes or excludes seasonal employees will be less important than the need for both parties to avoid strikes at critical harvest periods, lest disaster be visited upon all concerned. It is not difficult to envision the employer concluding that negotiations must be brought to impasse at a (relatively) non-critical point in the year so that, if need be, a lock-out can be endured.

5. Having expressed those concerns I repeat that the decision is entirely consistent, in my view, with the evidence and the *Labour Relations Act*.

3308-93-U Eugene Kalwa, Applicant v. Ontario Hydro, Responding Party v. The Society of Ontario Hydro Professional and Administrative Employees, Intervenor

Constitutional Law - Intimidation and Coercion - Unfair Labour Practice - Hydro employee alleging various acts of intimidation by employer related to exercise of rights under the Act - Employer alleging that Board without jurisdiction on ground that applicant's employment relationship with Hydro governed by *Canada Labour Code* - Applicant involved in inspecting nuclear facilities - Board concluding that inspections carried on by applicant "integral", "vital" or "essential" in relation to production of nuclear energy - Board concluding that applicant's employment relationship governed by federal legislation - Application dismissed

BEFORE: *Lee Shouldice*, Vice-Chair.

APPEARANCES: *Eugene Kalwa* on his own behalf; *Susan Serena* and *David Akande* for the responding party; *J. Berg* for the Intervenor.

DECISION OF THE BOARD; March 25, 1994

I. Introduction

1. This is an application brought pursuant to section 91 of the *Labour Relations Act*, in which the applicant alleges a violation of section 71 of the Act by the responding party, Ontario Hydro. The applicant describes in his complaint a lengthy series of events that he characterizes as intimidation or coercion by Ontario Hydro related to the exercise of his rights under the Act. Ontario Hydro disputes the applicant's characterization of the events.

2. At the outset of the hearing, The Society of Ontario Hydro Professional and Administrative Employees (hereinafter "The Society") was, by the agreement of the parties, permitted to intervene in this application.

3. The responding party has raised a preliminary motion before the Board, asking me to decline jurisdiction to hear this application on the ground that the applicant's employment relationship with Ontario Hydro is governed by the *Canada Labour Code* (R.S.C. 1985, c.L-2), rather than the *Labour Relations Act*. This conclusion is urged upon me as a result of the decision of the Supreme Court of Canada in *Re Ontario Hydro and Labour Relations Board et al* (1993), 107 D.L.R. (4th) 457 (hereinafter referred to as "*Ontario Hydro*"). Various other preliminary objections were also argued by the parties. As a result of the conclusion that I have reached on the preliminary objection going to constitutional jurisdiction, it is not necessary for me to deal with the other preliminary objections argued.

4. On March 2, 1994, I provided the parties with a 'bottom line' decision in which I allowed the preliminary motion and dismissed this proceeding. These are the reasons for that decision.

II. The Facts

5. The Board heard the evidence of three witnesses - Dr. Eugene Kalwa, the applicant; Mr. David Carr, Manager of the Specialized Inspection and Maintenance Department of Ontario Hydro Nuclear Technology Services; and Mr. Michael Lathem, an employee of Ontario Hydro employed in its Staff Relations Division. Much of the evidence before the Board was not in dispute. However, some facts were in dispute and accordingly I make the following observations

regarding the credibility of the witnesses, in particular Dr. Kalwa and Mr. Carr. I found that Mr. Carr was a far more credible witness than Dr. Kalwa. Mr. Carr's evidence was provided in an even-handed manner. Dr. Kalwa, on the other hand, seemed unable to resist the temptation to mischaracterize or misstate what appeared to be uncontradicted fact hardly worthy of dispute. He answered questions put to him by both opposing counsel and the Board in a non-responsive manner. Dr. Kalwa often relied upon semantics when responding to questions from opposing counsel. Accordingly, where the evidence of Dr. Kalwa and Mr. Carr was inconsistent, I have accepted the version of the facts provided to the Board by Mr. Carr.

6. The evidence establishes that the applicant was employed by Ontario Hydro on December 4, 1989 as an Assistant Technical Supervisor (MP2) in the Inspection and Maintenance Department of the Central Production Services Division, Production Branch, Ontario Hydro. As at the date of hearing, he was an Assistant Scientist (MP2) in the Specialized Inspection and Maintenance Department of Ontario Hydro Nuclear Technology Services. Dr. Kalwa is a certified Atomic Radiation Worker and has received training in radiation detection. The applicant is represented by The Society in his employment with Ontario Hydro.

7. The Specialized Inspection and Maintenance Department carries out specialized inspections and maintenance activities for all of the nuclear facilities operated by Ontario Hydro. The primary purpose of the inspections is to locate flaws in the nuclear structures before leaks of a radioactive nature occur. The applicant described himself as a participant in the "non-destructive" testing of equipment and "technical objects" at these nuclear facilities (such as elements of generators or turbines, boilers, piping and concrete structures). The results of the tests performed by the department are recorded in a report which is forwarded to the particular station's Nuclear Safety and Licensing Group, which in turn is used to support that Group's case to the Atomic Energy Control Board ("A.E.C.B.") for a continued licence to operate the generating station. The reports, if positive, establish that the nuclear facility systems and components are fit for operation. Dr. Kalwa conceded in testimony that the report he would provide to the Group is a key piece of information used by station personnel who ultimately assess the overall safety position of the station.

8. The actual functions performed by Dr. Kalwa during an inspection depend upon the scope and nature of the inspection in which he is asked to participate. Dr. Kalwa, it should be noted, does not physically perform tests on the nuclear facility's systems or components. The actual performance of test is conducted by technicians who are members of the Power Workers' Union. However, as will be outlined directly below, the evidence discloses that the applicant has extensive pre-testing involvement in the planning and co-ordination of the inspection, participates during the inspection by attending at the nuclear station and co-ordinating the individuals performing the inspection, and also participates in the preparation of the post-inspection report.

9. The "life cycle" of an inspection essentially follows the following general pattern. An inspection is scheduled to be performed by Dr. Kalwa's department. As an "MP2" Assistant Scientist, he is responsible for obtaining, reviewing, and, if necessary, developing the relevant procedures required to perform the inspection. He reviews drawings of the objects to be inspected to ensure that an inspection can be carried out with the procedures available. If not, he is responsible for determining procedures which will effect the inspection. He is required to list all the necessary equipment required for the inspection, identify the technical help required for the inspection, establish a crew to do the work and, generally, "pull the job together". This may, in fact, require the design and development of tools or other equipment to perform the inspection. The Assistant Scientist is responsible to ensure that the technicians performing the inspection are trained on the

procedures and equipment to be used at the nuclear site. As noted by both Mr. Carr and Dr. Kalwa, there is very little room for improvisation in the inspection of a nuclear station.

10. It is also the Assistant Scientist's responsibility to arrange for the receipt of any permits required to perform the inspection. The inspection of a nuclear generating station is a highly regulated activity. In order to enter the facility to perform his job responsibilities Dr. Kalwa (and other technicians) require permission of the station. If there are special conditions present at the nuclear site at which the inspection is to be performed, this information is to be obtained from the nuclear station by Dr. Kalwa.

11. The actual inspection is carried out as quickly as possible, as one might expect when inspections are undertaken in radioactive environments. While the tests are performed the crew wear rubber suits and other safety equipment. Dr. Kalwa is typically present on site to guide the technicians should there be any questions raised regarding the proper procedures to be followed to complete the inspection, although it is clear from the evidence that Dr. Kalwa is not a "supervisor" of these individuals in the sense that he cannot as a superior direct them to do particular tasks. Dr. Kalwa is responsible to ensure that the results of the inspection are properly recorded and documented. He is also responsible for any communication with station staff before, during and after the inspection.

12. As noted above, the applicant ultimately prepares a report which is forwarded to the station's Nuclear Safety and Licencing Group. It is not the responsibility of the applicant to give an opinion in the report as to the relative degree of safety of the objects inspected, as that assessment is ultimately made by the station's Nuclear Safety and Licensing Group. Mr. Carr testified that, if the A.E.C.B. doubted the case being put forward by the station's Nuclear Safety and Licencing Group, the A.E.C.B. could ask to review, amongst other things, the inspection reports created by Assistant Scientists such as Dr. Kalwa.

13. The evidence before the Board establishes that the inspections carried out by the applicant's department vary greatly in size. Some inspections are quite small, and are performed with the use of a small camera. Others, which were described by Mr. Carr as "campaigns", require months of preparation, in which mock inspections are carried out off site in order to ensure that the technicians are properly trained so as to minimize the amount of time spent in the nuclear facility. Dr. Kalwa is involved in this training.

14. The nuclear generating stations operated by Ontario Hydro consist of various buildings and facilities which together house the structures required to generate nuclear energy. The evidence establishes that inspections are performed by the applicant's department in the vacuum building, the reactor building and the powerhouse at any of the stations. These areas are all radioactive to some extent, some areas greater than others. All of the inspections are regulated by the A.E.C.B. to ensure that proper procedures are followed.

15. A great deal of evidence was led regarding the percentage of working hours that the applicant spent in his office. Dr. Kalwa estimated that he spent ninety per cent of his work time physically in his office, and ten per cent of his time participating in inspections of nuclear stations. Mr. Carr, in contrast, estimated that the typical Assistant Scientist at the MP2 level such as Dr. Kalwa would spend between one half and two-thirds of his time in the office preparing for inspections which were to be performed. Having had an opportunity to review the applicant's 1993 travel expense sheets which were placed into evidence to establish the extent of his travels to and from the responding party's nuclear generating stations in Ontario, I am satisfied that the applicant's percentage assessment of his in-office work time is not fairly representative of the time he spent in his office. Although it is difficult from a review of the applicant's travel records to assess the exact

amount of time spent by the applicant actually performing inspections at the nuclear generating stations, all of the time recorded out of his office related to numerous inspections performed or to be performed by his department. Dr. Kalwa acknowledged that in 1993 he performed six different inspections of nuclear stations in Ontario. He also acknowledged that the work conducted at his office relates to inspections which have been performed, are to be performed, or are being developed for nuclear stations.

16. Until just recently, Dr. Kalwa's office was located in downtown Toronto. He is now located in the employer's Training and Mock Up building in Pickering, Ontario. This building is located just outside of the Pickering Nuclear Generating Stations, in what was described as the "construction" area. Various fences and/or guard houses stand between this building and the Pickering Nuclear Generating Stations. On the basis of the evidence of Mr. Carr, I am satisfied that this building is considered part of the Pickering Nuclear Generating Stations, although it is abundantly clear that Dr. Kalwa's inspection activities are not limited in any way to those nuclear generating stations.

17. Entered as an exhibit in these proceedings was the Operating Licence issued by the A.E.C.B. which authorizes Ontario Hydro to operate Pickering Nuclear Generating Station "B". Attached to that licence are conditions governing the operation of the nuclear facility, three of which provide as follows:

- A.A.11 Maintenance at the nuclear facility shall be of such a standard that, in the opinion of the Board, the reliability and effectiveness of all equipment and systems as claimed in the Safety Report and the documents listed in the application are assured.
- A.A.12 Operations, reports, tests, inspections, analyses, modifications, or procedural changes requested by the Board are to be completed expeditiously.
- A.A.13 Except as otherwise directed in writing by the Board, all systems shall be tested at a frequency sufficient in the opinion of the Board to substantiate the reliability claimed or implied in the Safety Report or in the documents listed in the application.

It was the evidence of Mr. Carr, which I accept, that the inspections carried out by the applicant's department fall within the activities described by these paragraphs.

18. There is no dispute that the type of work performed by the Specialized Inspection and Maintenance Department is also performed by outside contractors, and that Dr. Kalwa's department competes for business with these companies. Should outside contractors be obtained for an inspection, it is the Specialized Inspection and Maintenance Department that contracts with these companies. The individuals who perform the inspections must be certified as Atomic Radiation Workers and perform the inspection subject to the same regulations as Dr. Kalwa and his department. The applicant conceded that there are times when he is in the station while these outside contractors perform the inspection.

19. Finally, the evidence before the Board establishes that, as a result of the decision of the Supreme Court of Canada in *Ontario Hydro*, The Society has brought an application for certification before the Canada Labour Relations Board on behalf of approximately 3,700 employees of Ontario Hydro. Dr. Kalwa is amongst these employees. This application has not yet been disposed of by the Canada Labour Relations Board.

III. Argument

20. Counsel for Ontario Hydro asserted that the evidence before the Board clearly showed that the applicant performed activities which are integral to the safety of the nuclear generating

stations operated by Ontario Hydro. Counsel described the applicant as playing a fundamental role in the inspection process, which process itself plays a fundamental role in the safe operation of the nuclear generating stations.

21. Counsel submitted that there was little guidance in characterizing the applicant's work as being "outside" or "inside" the stations. In her view, it is clear that the work performed by the applicant outside of the nuclear stations had a significant impact on the work done inside the stations. She emphasized that the goal of the department is to spend as little time as possible in the radioactive areas of the stations. This goal is reached by rehearsing all elements of the plant inspection outside of the station. Counsel urged the Board to focus on the overall purpose of the applicant's job when determining his proper constitutional status.

22. Counsel referred the Board to a number of authorities and thoroughly and helpfully reviewed the pertinent portions of each. Reference was made in argument to the *Canada Labour Code*; *The Atomic Energy Control Act*; Atomic Energy Control Regulations, C.R.C. 1978, c. 365; *Re North Canada Air Ltd. and Canada Labour Relations Board (No.1)* (1980), 117 D.L.R. (3d) 206 (F.C.A.); *Re Seafarers' International Union of Canada - CLC-AFL-CIO and Crosbie Offshore Services Ltd. et al* (1982), 135 D.L.R. (3d) 485 (F.C.A.); *Butler Aviation of Canada Limited v. International Association of Machinists and Aerospace Workers et al* (1975), 76 CLLC para 14,008 (F.C.A.); *Highway Truck Service Ltd. v. Canada Labour Relations Board* (1985), 62 N.R. 218 (F.C.A.); *Re Bernshine Mobile Maintenance Ltd. and Canada Labour Relations Board* (1985), 22 D.L.R. (4th) 748 (F.C.A.); *Reimer Express Lines Limited* (1984) 57 di 178 (CLRB); *Northern Telecom Limited v. Communications Workers of Canada et al* [1980] 1 S.C.R. 115, and *Ontario Hydro, supra*.

23. Counsel for the Society briefly submitted that the position of Ontario Hydro ought to be upheld by the Board. Counsel submitted that it was The Society's view that the applicant will be found to be included in the bargaining unit once the application for certification filed with the Canada Labour Relations Board is determined.

24. The applicant, in argument, submitted that the tests and inspections referred to in the Operating Licence were different from the tasks performed by his department, and in fact referred to tests and inspections performed by A.E.C.B. staff. He characterized those tests as vital and essential to the operation of the station. In contrast, he submitted that the inspections and reports performed and prepared by his department of Ontario Hydro were of relatively minor importance, relating mainly to efficiency and not safety, and focused on the fact that the reports prepared by his department were typically not forwarded to the A.E.C.B. nor do they reach any conclusion as to the level of safety of the objects inspected. Dr. Kalwa further focused on the non-supervisory role he plays at Ontario Hydro and submitted that he was not responsible for nuclear safety at the stations.

25. Dr. Kalwa asserted that only individuals who perform vital and essential aspects of those inspections required to comply with the station's licence are federally regulated employees. He submitted that, because there are outside contractors who can and do perform the task performed by him, his job responsibilities are not vital or essential aspects of the inspections and that the *Canada Labour Code* therefore has no application to him. He described the work of his department as "sporadic" and "remotely related" to the nuclear stations. He pointed out to the Board that he has no daily contact with the A.E.C.B.

26. The applicant also stated that because the matters before the Board consist of "basic labour relations issues", they properly fall within the terms of the *Labour Relations Act*. He pointed out that his dispute with the responding party is not directly related to the safety of

Ontario Hydro nuclear facilities. The applicant also emphasized in argument the physical location of his workplace (i.e. outside of a nuclear generating station) and that he cannot come and go as he pleases from a nuclear station, instead requiring a permit to work inside the station.

IV. Decision

27. Section 2 of the *Canada Labour Code* provides as follows:

Sec. 2. In this Act,

“federal work, undertaking or business” means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing, ...

- (h) a work or undertaking that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more of the provinces;

...

Parliament has declared that certain works and undertakings related to atomic energy are for the general advantage of Canada, by way of section 18 of the *Atomic Energy Control Act*, R.S.C. 1985, c. A-16:

Whereas it is essential in the national interest to make provision for the control and supervision of the development, application and use of atomic energy and to enable Canada to participate effectively in measures of international control of atomic energy that may hereafter be agreed on; ...

18. All works and undertakings constructed:

- (a) for the production, use and application of atomic energy,
- (b) for research or investigation with respect to atomic energy, and
- (c) for the production, refining or treatment of prescribed substances,

are, and each of them is described to be, works or a work for the general advantage of Canada.

Also of importance is section 4 of the *Canada Labour Code*, which outlines the application of Part I of the *Code* (dealing with Industrial Relations):

Sec. 4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers.

28. As noted above, the issue of whether the *Canada Labour Code* or the *Labour Relations Act* applies to employees of Ontario Hydro who are employed on or in connection with Ontario Hydro nuclear facilities was recently considered by the Supreme Court of Canada in *Ontario Hydro*. In that case, The Society applied to this Board for a certificate representing a unit of employees of Ontario Hydro including those employed at nuclear plants operated by the utility. A group of employees challenged the application for certification on the basis that those individuals who worked at the nuclear facility fell within the jurisdiction of the *Canada Labour Code*. This Board decided (reported at [1988] OLRB Rep. Feb. 187) that it had no jurisdiction to deal with the application because it was intended in part to cover employees who worked at nuclear facilities who were governed in their employment relations with Ontario Hydro by the *Canada Labour Code*. The Ontario Divisional Court (reported at (1989), 69 O.R. (2d) 268) quashed the decision

of the Board, but on appeal to the Ontario Court of Appeal that Court set aside the judgment of the Divisional Court (reported at (1991), 1 O.R. (3d) 737). The Supreme Court of Canada, by a four to three decision, upheld the decision of the Ontario Court of Appeal.

29. The majority of the Court released two separate judgments. Laforest J. (L'Heureux-Dube and Gonthier JJ. concurring) concluded that both section 92(10)(c) of the *Constitution Act, 1867* (the declaratory power) and Parliament's power under section 91 of the *Constitution Act, 1867* to make laws for the peace, order and good government of Canada authorized Parliament to legislate regarding the production of nuclear energy. Lamer C.J.C., in a separate opinion, appears as well to found Parliament's authority to legislate in the area of nuclear energy production on the same constitutional provisions, although he adopts a somewhat narrower scope of legislative power in order that both federal and provincial legislative authority be respected. However, all 4 of the judges in the majority were in agreement that the power to regulate the labour relations of Ontario Hydro's employees involved in the production of nuclear energy is an integral and essential part of both Parliament's declaratory jurisdiction and its peace, order and good government jurisdiction. Laforest J. (L'Heureux-Dube and Gonthier JJ. concurring) was of the view at p. 477 that "the regulation of the labour relations of employees engaged in the production of nuclear energy falls within the exclusive powers granted to Parliament". Lamer C.J.C. concurred at p.462 that "the power to regulate the labour relations of those employed on or in connection with facilities for the production of nuclear energy is integral to Parliament's declaratory and p.o.g.g. jurisdictions" (emphasis in original text).

Both judgments conclude with the following words or words of a similar nature:

"I would dismiss the appeals and confirm the Order of the Court of Appeal reinstating the decision of the Ontario Labour Relations Board, and declaring that the *Canada Labour Code* applies to employees of Ontario Hydro who are employed on or in connection with nuclear facilities that come under section 18 of the *Atomic Energy Control Act*.

30. Court decisions have considered the substance of the phrase "on or in connection with" in the context of constitutional jurisdiction. Where the activity in question is not a core federal undertaking or work but is, instead, related in some way to a federal work or undertaking, the decision maker must determine whether the activity "is an integral part of or necessarily incidental to the operation of a federal work, undertaking or business". This assessment is to be performed in a "practical and commercial way". (See *Butler Aviation of Canada Limited v. Machinists & Aerospace Workers et al, supra*, at page 14,241). In *Northern Telecom Limited v. Communications Workers of Canada et al, supra*, Dickson J. (as he then was) made the following comments regarding the determination of constitutional jurisdiction in labour relations matters (at pages 132-3, S.C.R.):

A recent decision of the British Columbia Labour Relations Board, *Re Arrow Transfer Co. Ltd.*, [1974] 1 Can. L.R.B.R. 29, provides a useful statement of the method adopted by the Courts in determining constitutional jurisdiction in labour matters. First, one must begin with the operation which is at the core of the federal undertaking. Then the Courts look at the particular subsidiary operation engaged in by the employees in question. The Court must then arrive at a judgment as to the relationship of that operation to the core federal undertaking, the necessary relationship being variously characterized as "vital", "essential" or "integral". As the chairman of the Board phrased it, at pp. 34-5:

"In each case the judgment is a functional, practical one about the factual character of the ongoing undertaking and does not turn on technical, legal niceties of the corporate structure or the employment relationship."

In the case at bar, the first step is to determine whether a core federal undertaking is present and the extent of that core undertaking. Once that is settled, it is necessary to look at the partic-

ular subsidiary operation, i.e., the installation department of Telecom, to look at the "normal or habitual activities" of that department as "a going concern", and the practical and functional relationship of those activities to the core federal undertaking.

In the *Ontario Hydro* decision, Lamer C.J.C., after citing in part the above passage of Dickson J., concluded as follows (at p. 469):

Applying the same test to employees involved in the production of nuclear energy at Ontario Hydro's nuclear facilities, I think it is clear that their "normal or habitual activities" are intimately related to the federal interests in nuclear energy, since the extent of the federal government's interest in nuclear power production is its interests in health, safety and security, matters completely within the daily control of those operating nuclear facilities. ...

31. Applying the above principles to the evidence before the Board, I have concluded that Dr. Kalwa is employed "on or in connection with" Ontario Hydro nuclear facilities. Obviously, these Ontario Hydro operations are, at their very essence, engaged in the production of nuclear energy. The "subsidiary" operation engaged in by Dr. Kalwa is, of course, the inspection of the infrastructure of the facilities which produce the nuclear energy. The question to be addressed by the Board is whether the inspections carried out by Dr. Kalwa are an "integral", "vital", or "essential" task in relation to the production of nuclear energy, in a practical sense, and without reliance on 'technical or legal niceties'. In my view, the evidence before me is overwhelming that Dr. Kalwa's role is sufficiently 'integral', 'vital' or 'essential' to the production of nuclear energy that he be governed by the *Canada Labour Code* in his employment relations with Ontario Hydro.

32. The applicant attempted during argument to establish that he was a relatively minor player on the larger team that ensures the safe operation of nuclear facilities at Ontario Hydro. With all due respect, the evidence discloses otherwise. In my view, the applicant plays a critical role in the safe operation of Ontario Hydro nuclear facilities. It is true that the applicant does not physically perform the actual inspections of the facilities. However, the evidence discloses that Dr. Kalwa plans the inspections and ensures that proper procedures are available or developed so as to properly inspect the facilities. Dr. Kalwa ensures that the technicians are properly trained to perform the inspections required. If any of these 'pre-inspection' determinations or assessments are incorrectly made by Dr. Kalwa, the inspection may well be of no value to the nuclear generating station, or, worse yet, fail to detect a flaw in the structure or element of the station.

33. Furthermore, Dr. Kalwa prepares a report for the nuclear station's Nuclear Safety and Licensing Group upon which that Group certifies to the A.E.C.B. that its nuclear facility is or is not safe. Should Dr. Kalwa err in his report, either because of faulty data collection or because of improper inspection procedures (both tasks being his ultimate responsibility), the licence which is granted by the A.E.C.B. to operate the facility may be cancelled, withheld, delayed or revoked. It is this report upon which the station's Nuclear Safety and Licensing Group bases its assessment of the safety of the facility. Again, it is difficult in that light to conclude that Dr. Kalwa is merely a minor cog in an equally insignificant machine. This is so whether or not the A.E.C.B. staff also perform inspections, as was suggested by Dr. Kalwa in argument.

34. The fact that outside contractors are, on occasion, utilized by Ontario Hydro to perform specialized inspections does not persuade me to conclude in favour of the applicant. Contrary to the submission of the applicant, I do not believe that Ontario Hydro has somehow admitted or conceded by contracting out these inspections that the functions performed by Dr. Kalwa are not 'integral', 'vital', or 'essential' to its nuclear operations. In fact, quite the opposite conclusion can be reached, if one approaches the circumstances from the perspective that Ontario Hydro, by contracting out these inspections, effectively ensures an adequate supply of these specialized services

such that all of its inspection needs can be quickly and effectively satisfied no matter how many inspections are to be performed at any one time.

35. Dr. Kalwa also suggested in argument that, because he was not considered to be a "supervisor" by Ontario Hydro, he was not governed by the *Canada Labour Code*, insofar as he was not responsible for safety at the nuclear stations he inspects. I disagree with this submission. There was no dispute that Dr. Kalwa does not supervise others at Ontario Hydro in the traditional 'line management'-type role. That fact does not, however, take away from Dr. Kalwa's role in the production of nuclear energy for Ontario Hydro. His role is still one which is 'integral', 'vital' or 'essential' to this task whether or not he "supervises" the technicians who perform the inspections on a direct reporting line basis.

36. Finally, although I have concluded that the assessment given by Dr. Kalwa in his testimony regarding the proportion of working hours spent working in his office was not a fair assessment of that time, I wish to note here, particularly for the benefit of the applicant, that the distinction drawn in testimony between 'in office' and 'out of office' work had no bearing on the result reached in this particular case. It is abundantly clear from the evidence before me that whatever the proportion of time Dr. Kalwa spends in his office, the time spent there is used to prepare for upcoming inspections or to prepare reports recording the results of prior inspections. In either case, the work done 'in office' by Dr. Kalwa is as critical to the core activity - the production of nuclear energy - as that which is performed by Dr. Kalwa within the nuclear stations.

37. I conclude that Dr. Kalwa's employment relationship with Ontario Hydro is governed by and subject to the terms of the *Canada Labour Code* and not the *Labour Relations Act*. As a result, this application was dismissed as this Board is without jurisdiction to entertain it.

3443-93-R United Steelworkers of America, Applicant v. Roy Ayranto Sales Limited, Responding Party v. Group of Employees, Objectors

Certification - Charges - Membership Evidence - Certain employees alleging improprieties in collection of membership evidence by union - Board satisfied that allegations not impugning or casting doubt on membership evidence - Board rejecting evidence by employee to effect that she did not know that she was signing application for union membership when signing union card - Certificate issuing

BEFORE: *Janice Johnston, Vice-Chair.*

APPEARANCES: *P. Turtle, Marie Kelly, Wayne Fraser and Wes Dowsett for the applicant; Paul Wearing and Roy Ayranto for the responding party; C. J. Abbass on behalf of Tara Kavanagh, objector; Gina Mazara and Karen Kavanagh appeared on their own behalf, objectors.*

DECISION OF THE BOARD; March 14, 1994

1. This is an application for certification.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

3. Having regard to the agreement of the parties, the Board is satisfied that the following bargaining unit constitutes a unit of employees of the responding party appropriate for collective bargaining.

all employees of Roy Ayranto Sales Limited in the City of Sudbury, save and except supervisors and persons above the rank of supervisor.

Clarity Note:

The parties agree that Ms Colleen Rinta exercises duties of a confidential nature pertaining to labour relations and is therefore excluded from the bargaining unit. The parties further agree that Mr. Edwin Rinta, Inventory Control, exercises managerial functions and is therefore excluded from the bargaining unit.

4. The Board is in receipt of correspondence from various individuals employed by the responding party, Roy Ayranto Sales Limited (the "employer" or the "company"), asserting improprieties in the manner in which the membership evidence was obtained by the applicant, the United Steelworkers of America ("Steelworkers" or the "union"). In response to a motion by the union, the Board at the outset of the hearing into these matters dismissed some of the allegations, as they did not make out a *prima facie* case for the remedies requested, assuming all of the particulars relied upon in support of the allegations to be true and provable. However, it was appropriate to inquire into the allegations contained in correspondence filed with the Board by Ms. Gina Mazara, Ms. Tara Kavanagh and Ms. Sara Lavigne and a hearing was held for the purposes of doing so.

5. Although somewhat lengthy, as these letters were introduced into evidence, it is helpful to set out the correspondence received by the Board from the three individuals pertaining to their allegations of improprieties on the part of the union. The letter received from Ms. Mazara reads as follows:

Jan 14/94

I Gina Mazara an employee at CTC 105 was called Jan 6/94 at approx. 6:15 - 6.45 p.m. was told by the unidentified person who refused to give her name but I was 99% sure I recognized the voice as an ex-employee of CTS 105, and when I asked she said no but proceeded to give me not only the first name but the last name as well which lead me to believe it was the same person.

She then proceeded to tell that with out a union I would be not guaranteed a job in the new store which is to built this spring. I got very upset with this and told that the owner of the store has told us all we have a job in the new store. and that I didn't want or need a union to do anything for me because I believed the owner of the store would not lie to me. I also told her I would fight against any union who tried to come in.

Jan 9/94

One Sunday evening in and around 7 p.m. I received another phone call the voice sounded identical to the one I got Thursday Jan 6/94. but this time the person gave me her name and proceeded to tell me she wasn't the one who called. I didn't believe her so her fiancée who is an employee at Store CTC 105 took the phone and I hung up because I know he is involved in trying to get the union in.

Within 5 mins I received another call from her sister who is also an employee at CTC 105 to tell me it wasn't her sister who called. I was getting fed up so I said there is nothing left to say that is what I was led to believe. then I got another call shortly after I hung up from yet another wife of an employee to tell it was her who called but couldn't give me her name but I proceed to tell her who she was which agitated her and I then got so upset I hung up.

"Gina Mazara"

The letter received from Ms. Lavigne states:

January 24, 1994

Roy Ayranto Sales Limited

To Whom it may concern,

I am writing this letter because I was coerced into signing a union card and although I have now signed a petition against the union, I do not feel that justice has been done.

I am angered that I was blatantly[sic] lied to when I asked what I was signing as I am not in the habit of just signing anything. I am upset that on Thursday January 6th I was asked to enter an office by a fellow worker (whom the office did not belong to) and asked if I would sign a card "to show interest in a union, to get more information about the union". I signed as I am an open minded person and having never worked for a union, was interested in knowing more. I have always worked under the open door policy and always been able to talk to my employers if a problem arose. As a student and only working part time at Canadian Tire, I do not wish to have union dues taken off my pay cheque, and cannot see the advantages when not even guaranteed a vote.

I think someone should know that myself and maybe others were coerced into signing. Unfortunately, Mr. Ayranto's information about the union came out one day too late as I had already signed the card and the damage was done.

Last week, I received a letter from the Steelworkers which stated "that co-workers have been harassing and intimidating employees to sign a petition against the union" I was approached with honesty and openness[sic], which is a lot more than I can say when I was asked to enter an office and told "so and so is signing" to me that is coercion and intimidation, if not harassment. I was also told by a fellow coworker that although I had been lied to, not to say anything, because if management was to find out who signed, I would risk losing my job as I am a new employee. Is that not a threat?

Not only was I lied to, but betrayed and I am infuriated and upset. I only hope that others will write and if this union is approved I want people to know that it was not done fairly or honestly at that. Had I known the ramifications of that card I would not have signed.

Yours truly,

"Sara Lavigne"

The two letters from Ms. Kavanagh are as follows:

Jan 14, 1994

To Whom it may concern,

On Jan 5, 1994 at about 10:10 pm, I got a call from someone saying they represented the United Steel Workers of America. Asked if I ever thought of joining a Union. Then she proceeded to tell me if I wanted to be guaranteed[sic] a job at the new store location I would have to join the Union. I then asked her who she was and she told me it was confidential. By this time I have recognized[sic] the voice as Tammy Pilon who does not work at the store any more but her fiancée does, Ernie Cecchetto. I told them I would think about it, hoping they would call me back so I could get there name.

This phone call bothered me, so the next day I called the Steel workers. I spoke with Wayne Fraser (Area Co-Ordinator Northeast Ontario 675-2461). He said he did not know who called and that he would find out and have that person call me back and apologize. I have never received that phone call.

"Tara Kavanagh"

Jan 17, 1994

File No. 3443-93-R

Roy Ayranto Sales Limited

To Whom it may concern,

Fellow employees and I have petition against the United Steel Workers of America becoming are[sic] bargaining agent. We feel the way this Union was pushed on us is unfair and unconstituta[sic].

It is my belief that *all* the employees of Canadian Tire Store #105. I now[sic] for a fact that some people were never contacted about a union trying to get in. Myself, I was called Jan 5, 1994, but was failed to be told about a meeting on Jan 6, 1994 at 9:00 pm. So were many other employees.

I believe they went after students and part-time employees. They being Kevin Lampinen and Ernie Cecchetto. Ernies girlfriend and Kevins wife did the calling. These to[sic] ladies are not employees of are[sic] store. The tactics these people were using in my opinion were wrong and unfair.

They would tell people if they did not sign they would not have a job in the new store. This is a lie because Mr. Ayranto assured people in a memo that everyone would be going to the new store. Also people were told they would get benefits[sic] and full-time jobs and raises. These are statements they have no right to make.

I feel most employees are scared to voice an opinion in case the union gets in, and their opinions are held against them.

We have sent in petitions on Jan 7, Jan 10, (two this day), Jan 11, Jan 12. With a total of 31 employees. Some have signed Union Cards. From my understanding the ones after the Jan 7, 1994 do not count. Unless we are notified of register on the same day, how are we to object to this application. It took a week to be notified and the Terminal date is the Jan. 18, 1994. Which leaves us four days to do anything and two of those days are Saturday and Sunday which everything is closed.

All we are asking for is to make an edcated [sic] vote. Let the employees now[sic] the pros and cons. This decission[sic] is to[sic] important to be forced on us. I feel that I am my best bargaining agent. I know what I am worth to any employee.

Yours truly

"Tara Kavanagh"

6. The Board in this case heard evidence from six witnesses over five days of hearing. For the purposes of resolving the issues before me it is not necessary to set out this evidence in detail or to set out the evidence given by all of the witnesses. In particular, I do not propose to set out the evidence of Mr. Wayne Fraser, Area Co-ordinator for the union.

7. In *Can-Eng Metal Treating Ltd.*, [1988] OLRB Rep. May 444 the Board's general practices and policies with regard to the treatment of membership evidence filed in an application for certification were outlined as follows:

...

11. The object in certification proceedings is to determine whether a majority of the employees in the bargaining unit found by the Board to be appropriate for collective bargaining wish to be represented by the applicant trade union in their employment dealings with their employer. The

Labour Relations Act is structured so that, except where a pre-hearing vote is requested, the certification of trade unions in this Province is based primarily upon an assessment of the trade union's membership support as evidenced by membership records filed in support of the application. The Board does not inquire into opinions of the virtues of trade union representations except as evidenced by the applicant's documentary evidence and any timely petitions filed in opposition to the application. In Ontario, as in most Canadian jurisdictions, the representation vote exists as a residual mechanism for ascertaining the wishes of the bargaining unit employees in cases where either the applicant trade union does not have the support of more than fifty-five percent of the bargaining unit employees, which is necessary for outright certification under section 7(2) of the Act (but does have the support of not less than forty-five percent of them), or where the circumstances are such that the Board sees fit to direct that a vote be taken notwithstanding that there is documentary evidence showing membership support in excess of fifty-five percent. The Board's discretion in that respect must be exercised in a manner which is consistent with the legislated primacy of membership evidence as the means by which employee wishes are to be ascertained.

12. Accordingly, the Board relies heavily upon the membership evidence filed by an applicant trade union. Because of the consequences of the reliance that the Board places on what is a form of hearsay evidence which, pursuant to section 111(1) of the Act, is not usually disclosed to the employer or employees opposing the application and is not usually subject to cross-examination, the Board requires a high standard of integrity and precision in the nature and quality of membership evidence. In order to protect the integrity of a certification process which places heavy reliance upon what is essentially hearsay evidence of support for an application for certification, the Board requires trade unions to be scrupulous in the manner in which they conduct their organizing campaigns and obtain membership evidence. Accordingly, the Board must consider any substantial allegations which, if proved, might cast doubt on the reliability of membership evidence. Evidence of improper conduct by a trade union or its supporters may raise sufficient doubt as to whether that documentary membership evidence filed in support of an application for certification is a reliable indicator of employee support for the applicant to cause the Board to resort to the confirmatory evidence of a representation vote notwithstanding that the membership evidence shows, on its face, the union to have the support of more than fifty-five percent of the employees (see *Alderbrook Industries Limited*, [1981] OLRB Rep. Oct. 1331; *St. Michael Shops of Canada Limited*, [1979] OLRB Rep. April 346; *The Kendall Company (Canada) Limited*, [1975] OLRB Rep. Aug. 611). In cases where improper conduct is established, the Board must assess the probable impact of that conduct on a reasonable employee having regard to the circumstances, including the nature of the particular workplace. The Board does not act as a censor of the social pressures which are commonly exerted for and against certification. As the Board noted in *Alderbrook Industries Limited*, *supra*:

13. Unfortunate as it may be, it is not uncommon for antagonism to be generated between employees who line up on opposite sides of a campaign for union representation. Statements by any person amounting to intimidation or coercion of an employee, whether they are made for or against a union, are clearly contrary to section 70 of the *Labour Relations Act* and are grounds for a complaint under section 89 of the Act. They may also form the basis for criminal charges. It does not follow, however, that the indiscretions of employees, whether they favour a union or sympathize with their employer[sic], are to be held against the principal parties to an application for certification. The Board can no more hold against a union a verbal threat made to an employee's job security by an indiscreet employee who is neither a union officer nor a collector of union membership cards than it can hold against an employer similar threats made by a fervently anti-union employee acting on his own. Evidence of widespread threats which are made by neither the employer nor the union might, of course, cause the Board to resort to the further evidence of a representation vote.

8. The Board in *The Kendall Company (Canada) Limited*, [1975] OLRB Rep. Aug. 611 articulated the following test:

...

16. In all cases alleging improper trade union conduct the Board first begins by assessing the nature of the conduct -- the test being would it deter the reasonable employee? If the answer to this question is in the affirmative the Board must go on to assess the possible significance of the conduct and in this regard the identities of those persons involved are very important. Where the action impugned is that of a responsible official of the trade union a single indiscretion may cause the Board to conclude that it cannot place reliance on any of the evidence of membership submitted by the union. Where the irregularity relates to evidence of membership procured by a person of lesser rank in the union organization, the actual cards involved may be disallowed and the weight to be given to the remaining evidence of membership will depend on the nature of the irregularity and the extent to which the objectionable practice was resorted to in the signing of members. (See *Webster Air Equipment Company Ltd.* 58 CLLC para. 18,110; *Walter E. Selck of Canada Ltd.* [1964] OLRB Rep. June p. 138; *Linhaven Home for the Aged* [1962] OLRB Rep. May 66.)

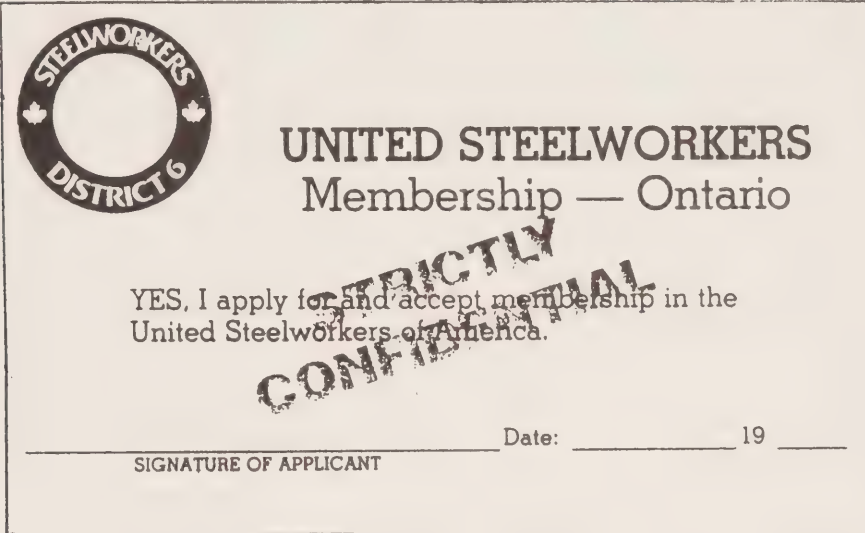
9. The Board heard evidence from Ms. Tara Kavanagh and Ms. Gina Mazara concerning the allegations set out in their correspondence. Their verbal testimony was consistent with their letters. I found them both to be credible and candid witnesses and their evidence was not challenged in any material fashion by the union. I accept their evidence that they were both upset and concerned with regard to the telephone calls they received. Ms. Mazara indicated that she was initially frightened by what she was being told and later became angry. Their evidence makes it clear that the individuals who made the telephone calls were either employees, spouses of employees or former employees of the company. The individuals were known by Ms. Mazara and Ms. Kavanagh to be union supporters and involved in the union's organizational drive. Ms. Kavanagh knew that they did not represent the Steelworkers. In addition, both Ms. Kavanagh and Ms. Mazara knew that the individuals did not have the authority to carry out the threats made to their job security. As Ms. Mazara put it in her evidence "I said its not true, you can't do that. We were told by Mr. Ayranto, the owner - he said we were all guaranteed a job. I told them they had no right to say that ...". When asked in cross-examination why she felt that way, Ms. Mazara responded, "They're not my boss, Mr. Ayranto is". Both individuals also made it clear in their letters to the Board that they felt that the individuals who telephoned them did not have the right to make any statements concerning their jobs. They knew that the individuals could not carry out any threats as they did not have the authority or ability to do so.

10. The other significant fact in this case is that neither Ms. Mazara nor Ms. Kavanagh signed a union card as a result of the telephone calls they received.

11. There is no evidence that similar comments or threats to job security were made to any other individuals or that anyone signed a union membership card as a result of such a threat. There is no basis therefore to conclude that the recruiting tactics employed with regard to Ms. Mazara and Ms. Kavanagh were widespread. The evidence does not substantiate the existence of a "climate of fear" that might reasonably call into question the true wishes of the employees (see *Alderbrook Industries Limited*, [1981] OLRB Rep. Oct. 1331). In addition, there is no reason to conclude that even if similar comments had been made to other employees that they would have been taken seriously. I have no reason to believe that any other employee would have reacted any differently than Ms. Mazara and Ms. Kavanagh did. This is not to say that the Board condones ill-advised and inappropriate comments such as were made by the union's supporters in this case. However, it is obvious that the comments did not have the desired impact as it was known that they did not have the power to enforce them. Had these comments been made by full-time union organizers, the result may have been different.

12. Therefore, I conclude that the allegations raised by Ms. Mazara and Ms. Kavanagh do not in any way impugn or cast doubt upon the membership evidence submitted by the union in this case.

13. Turning now to the concerns expressed by Ms. Sara Lavigne, it is helpful to start by setting out the document that she signed on January 6, 1993. It reads as follows:



The image shows a membership card for the United Steelworkers of America, District 6, Ontario. On the left is a circular logo with "STEELWORKERS" at the top and "DISTRICT 6" at the bottom, flanked by two maple leaves. To the right of the logo, the text reads "UNITED STEELWORKERS Membership — Ontario". Below this, a statement says "YES, I apply for and accept membership in the United Steelworkers of America." A large, diagonal "CONFIDENTIAL" stamp is overlaid across the center. At the bottom, there is a line for the "SIGNATURE OF APPLICANT" and a "Date: _____ 19 ____" line.

14. In her letter to the Board Ms. Lavigne states that she was “coerced” into signing a union card. There is no evidence to support any allegation of coercion. The issue with regard to the card signed by Ms. Lavigne is quite simple. She takes the position that she did not think she was joining the Steelworkers union when she signed the membership card. She signed the card, to use her words, “to show interest in the union, to get more information about the union”. She testified that at the time she signed the card that is what she was told. She testified that she did not intend to join the union and had no idea that by signing the membership card she was doing so. In cross-examination Ms. Lavigne was asked questions concerning the information she was hoping to get and she indicated that she wanted information about what the union was all about. When asked why she had not questioned the person who gave her the card before signing the card, she indicated she didn’t know. At the time of the application, Ms. Lavigne was attending Laurentian University and working part-time for the company. She testified that when she signed the card she asked what it was, as in her words, “I just don’t sign anything”. In cross-examination Ms. Lavigne admitted that she read the card before she signed it.

15. After having carefully reviewed the evidence of Ms. Lavigne I cannot accept her assertion that she did not realize what she was signing. She indicated that she read the card prior to signing it and it is extremely straight-forward. In the circumstances it is simply not believable and would stretch reality to conclude that Ms. Lavigne did not know that she was signing an application for membership in the Steelworkers.

16. The Board heard conflicting evidence concerning who was actually present when Ms. Lavigne signed the union membership card. Ms. Lavigne testified that she was alone with another employee named Shawn Dempsey. Mr. Dempsey and Mr. Steve Ross, another employee, testified that they were both present when Ms. Lavigne signed the membership card. Mr. Ross signed the back of Ms. Lavigne’s card as the “collector” of the card. In addition to Ms. Lavigne’s card Mr. Ross signed as the collector of ten other cards. Mr. Ross was called as a witness and was questioned regarding the collection of the other cards. Based on that testimony I have no reason to

question the validity of those additional ten cards submitted in support of the application for certification.

17. Neither Ms. Lavigne nor Mr. Ross were particularly credible witnesses concerning the meeting at which Ms. Lavigne signed her card. Ms. Lavigne was less than truthful with the Board concerning her understanding of what she was signing and Mr. Ross was evasive, vague and seemed to have a selective memory concerning the meeting. However, Mr. Dempsey was a credible witness and the evidence of Mr. Ross and Mr. Dempsey was essentially consistent and corroborative. Therefore, on balance, I prefer and accept the evidence of Mr. Ross and Mr. Dempsey that they were both present when Ms. Lavigne signed the membership card and that Mr. Ross then took the card. There is no reason therefore to not rely on the membership card submitted to the Board on behalf of Ms. Lavigne.

18. In final argument, counsel on behalf of the objecting employees referred the Board to numerous cases dealing with issues concerning the sufficiency of what used to be the Board's Form Nine (Declaration Concerning Membership Documents). Counsel argued that the Board in the case before me had reason to question the sufficiency of the Form A-4 (Declaration Verifying Membership Evidence) filed with the membership evidence and urged me to accept the reasoning of the jurisprudence and direct a vote. Given the conclusions reached above the union has complied with the requirements of the Form A-4 declaration and I see no reason to find it deficient.

19. The union has demonstrated membership support in excess of fifty-five per cent of the employees of the employer as of January 7, 1994, the certification application date. A certificate shall therefore issue for the following bargaining unit:

all employees of Roy Ayranto Sales Limited in the City of Sudbury, save and except supervisors and persons above the rank of supervisor.

Clarity Note:

The parties agree that Ms Colleen Rinta exercises duties of a confidential nature pertaining to labour relations and is therefore excluded from the bargaining unit. The parties further agree that Mr. Edwin Rinta, Inventory Control, exercises managerial functions and is therefore excluded from the bargaining unit.

3433-92-JD The Board of Health for the Peterborough County-City Health Unit, Applicant v. The Association of Allied Health Professionals: Ontario, and Ontario Nurses' Association, Responding Parties

Jurisdictional Dispute - ONA and AAHPO disputing work jurisdiction in connection with Health Promoter position at board of health - Board applying *Eastern Ontario Health Unit* case - Board determining and directing that where employer uses nurses to fill Health Promoter position, that position should be included in ONA bargaining unit - Where employer uses other than nurses to fill Health Promoter position, that position should be included in AAHPO unit

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *W. H. Wightman* and *P. V. Grasso*.

APPEARANCES: *Walter Thornton*, *Lorraine Cruwys*, *Maureen McKeen*, and *Ann Keys* for the

applicant; *James Fyshe* and *Lynn Keays* for The Association of Allied Health Professionals: Ontario; *Elizabeth McIntyre*, *Maureen O'Halloran*, *Bertha Kovacs*, and *Paul Marshall* for the Ontario Nurses' Association.

DECISION OF THE BOARD; March 25, 1994

1. This is an application under section 93 of the *Labour Relations Act* in which the applicant (also referred to in this decision as the "Employer") requests a work assignment direction (and certain other relief) with respect to the work performed by its employees in the classification of Health Promoter.

2. In deciding this application, the Board has duly considered all of the voluminous material filed by counsel on behalf of their respective clients, as well as their able oral submissions to the Board at the consultation held on February 10, 1994, pursuant to section 93(1.1) of the Act.

3. The applicant provides public health care programs and services in the City and County of Peterborough. It has a longstanding collective bargaining relationship with the Ontario Nurses' Association ("ONA"). The recognition clause in their most recent collective agreement provides as follows:

- 2.01 The Employer recognizes the Association [ONA] as the sole collective bargaining agent for all registered and graduate nurses employed by the Board of Health for the Peterborough County-City Health Unit, save and except the Director of Nursing, Home Care Director, Assistant Director of Home Care and Senior Supervisors.

(For ease of reference, the term "nurses" (and "nurse") will be used in this decision to encompass both registered nurses and graduate nurses.)

4. On March 27, 1990, the Board (in File No. 2944-89-R) certified the Association of Allied Health Professionals: Ontario ("AAHPO") as bargaining agent for all of the applicant's paramedical employees, with the exception of certain specified exclusions. AAHPO and the applicant subsequently entered into a collective agreement containing the following recognition clause:

- 2.01 The Employer recognizes the Association [AAHPO] as the exclusive bargaining agent for all paramedical employees of the Employer in Peterborough County and the City of Peterborough, save and except supervisors, persons above the rank of supervisor, students employed during the school vacation period and employees for whom any trade union held bargaining rights as of February 28, 1990.

5. On August 10, 1990, the Board (in File No. 0635-90-R) certified the Canadian Union of Public Employees ("CUPE") as the bargaining agent for "all employees of The Board of Health for the Peterborough County-City Health Unit in Peterborough County and the City of Peterborough, save and except supervisors, persons above the rank of supervisor, persons for whom any trade union held bargaining rights as of May 29, 1990, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." CUPE and the applicant subsequently entered into a collective agreement in respect of that bargaining unit.

6. The applicant created the classification of Health Promoter in the summer of 1988 and hired a new employee named Margaree Edwards to fill that classification. ONA was the only one of the aforementioned unions which held bargaining rights for any of the applicant's employees at that time. It did not claim jurisdiction over the work performed by Ms. Edwards because she was not a nurse and, as far as ONA was aware at that time, the position for which she was hired was to

a great degree involved in community relations and media work. Ms. Edwards' job title was changed to Supervisor of Health Promotion in December of 1990.

7. The next Health Promoter position created by the applicant was that of "Health Promoter, Tobacco Use Prevention". That position's job description includes the following information:

Position Summary:

Responsible under the direction of the Supervisor of Health Promotion for the development, implementation and evaluation of the Tobacco Use Prevention Program (TUP) with an emphasis on community based strategies for increasing the participation of the community in tobacco use prevention activities.

Major Duties and Responsibilities:

- * To act as a consultant to Health Unit Staff, the public, community agencies, organizations and groups.
- * To assist in the co-ordination of the development, implementation and evaluation of the TUP program.
- * To establish and maintain liaison, as assigned, with community agencies, organizations, groups and individuals so as to ensure effective co-ordination of services.
- * To participate on relevant agency and/or community boards and committees as assigned.
- * To develop and maintain public awareness of the program through media visibility and promotion in the community.
- * To assess, procure and/or develop appropriate resources for program development and implementation.
- * To categorize tobacco use prevention resources for the Health Information Access System (HIAS).
- * To conduct tobacco use prevention presentations, inservices, updates and orientations for Health Unit Staff, elected and professional groups, agencies and organizations.

Other:

- * To advise the supervisor of projected program expenses for budget purposes.
- * To monitor, analyze and manage expenditures within given allocations.
- * To prepare reports and keep statistics as required.
- * To maintain professional competency.
- * To assist in other projects as assigned by the supervisor.

Qualifications Required:

- * A bachelor's degree in health promotion or a related health/community discipline.
- * Well developed oral and written communication skills.
- * A vehicle is necessary with a valid Ontario Driver's Licence.

Preferred Qualifications:

- * Health promotion experience in tobacco issues.
- * Experience in program planning and development.
- * Familiarity with social marketing strategies, media relations and computer software applications are a definite asset.
- * Practical experience in community based health promotion.

8. In February of 1991 the applicant hired an individual named Larry Stinson to fill that position. Mr. Stinson has an Honours Degree in Physical and Health Education. Prior to accepting that position he had been employed by the Lung Association, where he had previously worked with Ms. Edwards before she commenced employment with the applicant.

9. At the time of the applicant's hiring of Mr. Stinson, both AAHPO and CUPE claimed the right to represent the classification of Health Promoter. After attempting unsuccessfully to resolve that issue through collective bargaining, AAHPO filed a Complaint Concerning Work Assignment under what was then section 91 [now section 93] of the Act in December of 1991 (File No. 3025-91-JD). The Employer was named as the respondent in that complaint, and CUPE was named as a trade union potentially affected by it. ONA was not named as a respondent or a potentially affected trade union, and did not receive notice of or participate in those proceedings. During the course of a pre-hearing conference, AAHPO, CUPE, and the Employer entered into a Memorandum of Agreement under which they agreed to the following disposition of that complaint:

The classification of Health Promoter is within the bargaining unit of the complainant [AAHPO], and as such is covered by the collective agreement between the complainant and the respondent.

10. In a decision dated April 3, 1991, another panel of the Board wrote, in part, as follows, in disposing of that complaint:

3. In light of that agreement, we find that the classification of Health Promoter is within the bargaining unit of The Association of Allied Health Professionals: Ontario, and as such is covered by the collective agreement between The Association of Allied Health Professionals: Ontario and the Peterborough County-City Health Unit.

11. Although CUPE was named in the instant application as a "trade union ... that may be affected by the application", it did not intervene or otherwise participate in these proceedings. Moreover, it was not suggested by any of the parties to these proceedings that any of the Employer's Health Promoter positions should be included in the CUPE bargaining unit.

12. In August of 1992 the Employer posted a new Health Promoter position titled "Health Promoter, Physical Activity Promotion". The qualifications specified in the posting were:

QUALIFICATIONS REQUIRED:

- * A bachelor's degree in physical education or a related health discipline.
- * Have at least 2 years practical experience in community based physical activity promotion.
- * Well developed oral and written communication skills.
- * A vehicle is necessary with a valid Ontario Driver's Licence.

QUALIFICATIONS PREFERRED:

- * Focus on community health and/or health promotion preferred.
- * Experience in program planning and development.
- * Familiarity with social marketing strategies, media relations and computer software applications will be a definite asset.

13. The successful applicant for the Health Promoter, Physical Activity Promotion position was Larry Stinson. The Health Promoter, Tobacco Use Prevention position which he vacated in order to assume that new position was posted in September of 1992 and filled by a nurse, as was another Health Promoter, Tobacco Use Prevention position that was posted in October of 1992. Both of the nurses who obtained those positions (Susan Harper and Christine Finlan) came from the ONA bargaining unit, but were treated by the applicant as no longer being in that bargaining unit once they became Health Promoters. A fourth Health Promoter position, bearing the title "Health Promoter, Substance Abuse Prevention", was subsequently posted by the Employer, but that posting was later withdrawn, pending the outcome of this application. As an interim measure, a nurse named Paul Marshall was "seconded" by the applicant to perform the duties of that position. Throughout his secondment, Mr. Marshall has continued to be covered by the ONA collective agreement and paid as a Public Health Nurse.

14. This is not the first case in which the Board has dealt with a jurisdictional dispute pertaining to health promoter positions. In File Nos. 2030-91-JD and 2164-91-JD, this panel was called upon to determine jurisdictional claims of AAHPO, ONA, and CUPE in respect of thirteen persons employed by the Eastern Ontario Health Unit in "Health Educator/Promoter" positions. In an unreported decision dated April 30, 1993, the majority (with Board Member Wightman dissenting) wrote, in part, as follows in making that determination:

7. The Employer created the position of Health Educator/Promoter in response to the "Mandatory Health Programs and Services Guidelines" (the "Guidelines") which were published by the Ministry of Health in April of 1989 for implementation by the end of 1992. All boards of health are required to provide, as a minimum, the programs and services specified in the Guidelines. That document contains "standards" whose purpose is to set out the requirements for fundamental health programs and services targeted at prevention of disease, health promotion, and health protection. One of the key principles around which the standards have been developed is the "efficient and effective use of resources, and utilization of interdisciplinary teams to gain health program excellence."

8. The introductory portion of the Guidelines contains the following information under the heading of "Staffing":

Each standard has a general statement that emphasizes an interdisciplinary approach.

Boards of health are expected to employ the services of appropriately trained professionals. This should be consistent with any qualification requirements of the Health Protection and Promotion Act and Ontario Regulation, Qualifications of Boards of Health Staff in respect of medical officers of health, public health dentists, dental hygienists, public health inspectors, public health nurses and public health nutritionists. Also, some boards of health employ staff with training in epidemiology, health promotion, speech pathology, toxicology and with other backgrounds that are appropriate for interdisciplinary program planning and effective program delivery.

In addition, the services provided by boards of health are expected to be delivered by staff with skills in the following areas:

- * community needs assessment
- * program planning
- * program evaluation
- * data management
- * health promotion
 - community development
 - social marketing
 - health education
 - adult education
 - behavior change education
- * case management
- * counselling
- * immunization practices
- * infection control
- * health hazard investigation and assessment
- * emergency planning

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20. The persons selected by the Employer to fill those thirteen positions have a variety of educational and experiential backgrounds. Five of the thirteen have previously been employed as Public Health Nurses, including three who were employed by the Health Unit as Public Health Nurses before becoming Health Educator/Promoters. Much of the work being performed by them is similar to the health education and promotion work previously or currently performed by Public Health Nurses employed by the Health Unit (such as doing presentations and workshops for community groups at schools and work places). Other persons selected by the Employer to fill Health Educator/Promoter positions have bachelors or masters degrees in such areas as physical and health education, sport administration, recreology, kinanthropology, food sciences, nutrition and population, and counselling and group dynamics. The individual holding the position that consists of .4 F.T.E. Public Health Inspection and .6 F.T.E. Healthy Lifestyles does not have a university degree but is a Certified Public Health Inspector with a Certificate in Public Health Inspection from Ryerson Polytechnical Institute, and a number of years of experience as a Public Health Inspector.

21. There is also a substantial variation in their prior experience, which includes promoting health, sports, and fitness to teachers and municipal officials on behalf of the Ministry of Tourism and Recreation; delivering fitness programs; planning, organizing, and conducting sports oriented activities; supervising cardiac patients in a cardiac rehabilitation program; analyzing fitness evaluations and developing personalized exercise programs; presenting nutrition education sessions; working as a dietetic supervisor; researching community resources for emergency planning purposes; serving as a counsellor and group facilitator in respect of overcoming sexual abuse trauma; and working for the Victorian Order of Nurses.

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24. In assessing the merits of jurisdictional disputes, the Board has traditionally considered a number of criteria, including the following:

- (a) collective bargaining relationships,
- (b) skill and training,
- (c) safety,
- (d) economy and efficiency,
- (e) employer past practice,
- (f) area or industry practice,
- (g) employer preference.

(See, for example, *Newmarch Inc.*, [1990] OLRB Rep. Feb. 179; *Quebec and Ontario Paper Company Ltd.*, [1989] OLRB Rep. July 796; *Spruce Falls Power & Paper Company Limited*, [1988] OLRB Rep. July 708; *Anchor Shoring Ltd.*, [1974] OLRB Rep. Aug. 528; *Boise Cascade Canada Ltd.*, [1979] OLRB Rep. Sept. 850; *Southam Murray Printing*, [1984] OLRB Rep. June 868; *Premier Pipelines Ltd.*, [1988] OLRB Rep. Oct. 1068; and *Toronto Star Newspapers Ltd.*, [1980] OLRB Rep. April 565.)

25. In *Electrical Power Systems Construction Association*, [1992] OLRB Rep. Aug. 915, the Board commented as follows concerning the relative weight which is generally assigned to those criteria in deciding jurisdictional complaints:

95. The past jurisprudence of the Board has generally enumerated and examined each of these various criteria. A careful review of that jurisprudence however indicates that the primary focus of the Board in deciding a complaint concerning work jurisdiction is upon the employer and area past practice evidence. It is the rare and unusual jurisdictional dispute complaint in which the Board does not attach significant and primary weight to the area and employer past practice. Where appropriate these two criteria are measured and balanced together with the factors relating to economy, efficiency and safety. The experience of the Board has shown that inevitably each of the disputing trade unions can point to some measure of skill or training and some language in either its collective agreement or constitution to support its claim. Generally, however and in the absence of some prohibition which prohibits one trade from performing the work (for example a statutory enactment which precludes any person other than a qualified, certified member of a trade from performing the work) the enumerated criteria other than area and employer practice (together with safety and economy and efficiency where appropriate) will have little if any value when balanced against area and employer practice evidence. The real crux of most jurisdictional disputes revolves around these two past practice criteria....

26. The criteria listed above, and in particular those mentioned in the preceding paragraph, are often of considerable assistance to the Board in the context of jurisdictional disputes arising (as they traditionally do) in the construction industry. However, they are only of limited assistance in resolving the instant dispute....

27. In the instant case, health educational and promotional work has been performed, to some extent, by employees in each of the three bargaining units. However, with the possible exception of the position of dental health educator, the educational and promotional work performed by employees has generally been only part of the employees' work. Although the dental health educator certainly performs educational functions, the scope of those functions is quite narrow. Moreover, the inclusion of that position in the C.U.P.E. bargaining unit despite its specific listing in the A.A.H.P.O. paramedical clarity note is an historical anomaly. Although C.U.P.E.'s bargaining unit is an "all employee" unit, it excludes "persons covered by subsisting collective agreements", such as paramedical employees and registered nurses. Moreover, few if any of the persons in the C.U.P.E. bargaining unit have the level of education or type of experience required for the position of Health Educator/Promoter, and many of the persons in that unit (such as secretaries, clerk typists, and custodians) would not share a community of interest with the persons in the Health Educator/Promoter classification.

28. The nature of the work performed by Health Educator/Promoters who are registered nurses, and the skills and knowledge which they utilize in performing it, lend substantial support to O.N.A.'s claim that persons in that classification who are registered nurses should be included in its bargaining unit. However, there is some variance in the duties and responsibilities of employees in that classification, and the Employer has a legitimate need to be in a position to adopt an interdisciplinary approach by utilizing Health Educator/Promoters with various types of training, knowledge, and experience in areas such as nutrition, recreology, and other aspects of health education and promotion. These factors render untenable O.N.A.'s contention that all of the Health Educator/Promoter positions should be awarded to registered nurses and included in its bargaining unit. For reasons which are largely historical in nature, the Board has granted O.N.A. bargaining units confined to registered and graduate nurses. That very narrow unit is undoubtedly advantageous to O.N.A. in a number of respects. However, it does not enable O.N.A. to dictate that, despite ongoing developments in the public health field as described

above, the Employer must use only registered nurses to perform health education and promotion work, even though persons with other educational or experiential backgrounds are equally or better qualified to perform various aspects of that work, and are essential to the interdisciplinary approach emphasized in the aforementioned Guidelines and standards. (See, generally, *Sudbury Algoma Hospital*, [1989] OLRB Rep. Apr. 390.) On the other hand, an employer such as the Health Unit whose work place is split into a number of discrete bargaining units cannot legitimately proceed as if those bargaining units do not exist by creating a broad classification covering some positions that should properly be included in one bargaining unit and other positions which should properly be included in a second (or third) bargaining unit. Although (in the absence of circumstances rendering it an unfair labour practice) the Health Unit is at liberty to select either a registered nurse or other duly qualified person to fill a Health Educator/Promoter position, if it elects to use a registered nurse that position must be included in O.N.A.'s bargaining unit, because registered nurses functioning as Health Educator/Promoters rely upon the knowledge and skills obtained through their nursing education and experience to fulfill the duties and responsibilities of those positions.

29. Thus, having regard to all the evidence, we have concluded that the positions held by Monique Bouvier, Heather Corbett, Chantal Lacelle, Sophie Leduc, and Patricia Topp, who are all registered nurses, should be included in O.N.A.'s bargaining unit. We have also concluded that the position held by Richard Chatelaine, a certified Public Health Inspector who spends forty per cent of his time performing the work of a Public Health Inspector, should be included in the C.U.P.E. bargaining unit so long as public health inspection duties remain a substantial proportion of the duties and responsibilities of that position. The remainder of the Health Educator/Promoter positions should be included in A.A.H.P.O.'s paramedical bargaining unit.

30. Accordingly, the Board hereby orders, pursuant to section 93(1.2) of the *Labour Relations Act*, that the work in dispute be assigned by the Eastern Ontario Health Unit in the manner described in the preceding paragraph.

15. In the instant case, the Employer initially contended (in the written submissions included in its application) that it is not practical for Health Promoter work to be covered by the ONA or AAHPO collective agreement depending on whether the person performing the work is or is not a nurse. Thus, the application (which was filed prior to the release of the aforementioned Eastern Ontario Health Unit decision) contained a request that the Board order that the work in dispute is covered by one collective agreement or the other, regardless of the qualifications of the person performing the work. However, at the February 10, 1994 consultation, counsel for the Employer submitted that the Board should apply an approach similar to that adopted in the Eastern Ontario Health Unit case by directing that if the Employer elects to use a nurse to fill a Health Promoter position, the position must be included in the ONA bargaining unit, but that if it elects to use someone who is not a nurse to fill a Health Promoter position, the position must be included in the AAHPO bargaining unit. It was the Employer's contention that adopting that approach would avoid the anomaly of having some of the nurses employed by the applicant represented by ONA and others represented by AAHPO. Counsel for the applicant also submitted that, in addition to avoiding the deleterious labour relations consequences which could result from that anomalous situation, applying that approach would enable the Employer to continue to select the most suitable person from the available individuals, without regard to whether that person is or is not a nurse.

16. AAHPO contends that all of the Employer's Health Promoters should be included in its bargaining unit unless the Employer makes being a nurse a qualification for a Health Promotion position, in which case the position with that requirement should be included in the ONA bargaining unit. ONA, on the other hand, submits as its primary position that all of the work in dispute should be assigned exclusively to nurses covered by its collective agreement. Alternatively, it submits that all Health Promoter work should be included in its bargaining unit whether or not it is performed by nurses, and that such work should be assigned to nurses in a proportion which prevents job loss to nurses. In the further alternative, ONA submits that in the event it is determined

that Health Promoter work may be assigned to nurses and non-nurses but that only nurses are to be covered by the ONA bargaining unit, Health Promoters who are nurses should be included as members of the ONA bargaining unit.

17. Having regard to all of the circumstances, we are of the view that this jurisdictional dispute should be resolved in a manner similar to that adopted in the Eastern Ontario Health Unit case (with the exception of the awarding in that case of a single position to CUPE on the basis of circumstances which are not present in the instant case). Although the duties and responsibilities of the applicant's Health Promoters have less variance than those of the Eastern Ontario Health Unit's Health Educator/Promoters, there remains a legitimate need for the Employer to be able in filling those positions to consider not only nurses, but also other individuals (such as Mr. Stinson) whose educational and experiential backgrounds qualify them to perform health promotion work, and who are essential to the interdisciplinary approach emphasized in the aforementioned Ministry of Health Mandatory Health Programs and Services Guidelines, and the related standards. However, we are also satisfied that, as in the Eastern Ontario Health Unit case, where the Employer elects to use a nurse to fill a Health Promoter position, that position should be included in ONA's bargaining unit in order to prevent an unwarranted erosion of that bargaining unit. Our determination in this regard reflects that fact that nurses employed as Health Promoters rely upon the knowledge and skills obtained through their nursing education and experience to fulfill the duties and responsibilities of those positions. It also reflects our view that, as contended by the Employer, it would be anomalous and unconducive to sound labour relations to have such nurses included in another bargaining unit, such as the one represented by AAHPO, in the circumstances of this case.

18. Accordingly, the Board hereby orders, pursuant to section 93(1.2) of the Act, that the work in dispute be assigned by the applicant in the manner described in the preceding paragraph. In accordance with the agreement of the parties, we will remain seized of this matter for the purpose of hearing submissions concerning the other relief requested by the Employer, in the event that it becomes necessary for those submissions to be heard.

2933-93-R Canadian Union of Public Employees, Applicant v. The Corporation of the City of Scarborough, Responding Party, v. Ontario Nurses' Association, Intervenor

Certification - Pre-Hearing Vote - Timeliness - Certification application made by raiding union timely when filed - Incumbent union submitting that notice given by it under section 35 of the *Social Contract Act* having effect of closing open period retroactively - Board finding no basis for interpretation offered by incumbent union - Board directing that ballots cast in representation vote be counted

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *W. H. Wightman* and *K. S. Davies*.

APPEARANCES: *Brian Sheehan* and *Daria Ivanochko* for the applicant; *Harvey A. Beresford*, *Tom Gill* and *John Wallace* for the responding party; *Richard A. Blair*, *Sharon Faulds* and *Valerie MacDonald* for the intervenor.

DECISION OF THE BOARD; March 1, 1994

1. This is an application for certification.

2. By decision dated December 7, 1993, the Board directed the holding of a pre-hearing vote and the sealing of the ballot box pending an inquiry into the intervenor's allegations that the application is untimely because of the effect of the *Social Contract Act* S.O. 1993 c.5.

3. The most recent collective agreement between the intervenor and the respondent expired on December 31, 1992. The application for certification was filed in a timely way, on November 22, 1993, in accordance with subsection 5(4) of the *Labour Relations Act*, which states:

5.- (4) Where a collective agreement is for a term of not more than three years, a trade union may, subject to section 62, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement only after the commencement of the last two months of its operation.

4. On November 29, 1993 the intervenor notified the respondent of its intention to extend the expired collective agreement as permitted by section 35 of the *Social Contract Act*, which states in part:

35.-(1) A bargaining agent may, by written notice to the employer of employees to whom this Part applies, require that a collective agreement be extended to March 31, 1996 if the agreement was or is governed by an Act that permits the employees to strike.

(2) The notice may be given before or after the collective agreement expires.

(3) The giving of the notice extends an existing collective agreement or, in the case of a collective agreement that has expired revives and extends the expired agreement to March 31, 1996.

(4) This section applies despite subsections 34(1) and (2)...

There is no suggestion that the notice was given in response to the application for certification.

5. In accordance with sub-section 35(3) of the *Social Contract Act*, the effect of the notice was to revive and extend the expired collective agreement. Subsection 35(4) then gives that effect primacy over sub-sections 34(1) and (2), which state:

34.-(1) Nothing in this Part alters the termination date of a collective agreement.

(2) Nothing in this Part interferes with any right to carry on collective bargaining so long as any collective agreement reached is not inconsistent with this Act.

6. Further, section 52 of the *Social Contract Act* states:

52. The provisions of this Act and the regulations prevail over the provisions of any other Act and the regulations thereunder but only to the extent necessary to carry out the intent and purposes of this Act.

7. The intervenor says that the combined effect of its notice to the employer and the foregoing provisions of the *Social Contract Act* was to extend the life of the collective agreement through what would otherwise have been the "open period" under sub-section 5(4) of the *Labour Relations Act*.

8. The intervenor relies on *Re Service Employees International Union and Broadway Manor Nursing Home et. al.* (1984) 48 O.R. (2d) 224, where the Court of Appeal found that the *Inflation Restraint Act* did not bar an application for certification because it extended only the terms and conditions of the collective agreement and not the collective agreement itself. In this

case, the intervenor says, subsection 35(3) expressly supplies what was missing in *Broadway Manor* by reviving and extending the expired agreement and not merely its terms. Accordingly, the application is made untimely by subsection 5(4) of the *Labour Relations Act*.

9. The Board does not agree. There can be no dispute on the evidence that the application for certification was timely *when filed*. What the intervenor is asking the Board to do, then, is determine that sub-section 35(3) of the *Social Contract Act* has the effect of closing the open period *retroactively*, so as to invalidate an otherwise valid application. There is no basis for any such interpretation.

10. It is a fundamental canon of statutory interpretation that legislation is not to be given retroactive or retrospective effect unless that intention is clearly manifest in the language of the enactment. (See, *Pizza Pizza Limited*, [1993] OLRB Rep. Apr. 373). In our view, and apart from section 58(1) which deems the Act to have come into force on June 14, 1993, no such intention is apparent in the *Social Contract Act*. In situations in which the collective agreement has already expired, sub-section 35(3) does not attempt to reach back to provide for a deemed continuation of the collective agreement through what would otherwise have been an open period, but merely provides that "the giving of the notice... *revives and extends* the expired agreement to March 31, 1996". This language speaks to the present and future, not to the past. Had it been the legislative intention to interfere with vested rights in the way proposed by the intervenor, it could have expressed that intention clearly.

11. In light of the foregoing, a majority of the Board finds it unnecessary to rule on the argument advanced by the respondent that the intent and purposes of the *Social Contract Act* can always be carried out without interfering with employee representation rights set out in the *Labour Relations Act* (see section 52 of the *Social Contract Act* above).

12. The Board therefore directs that the ballots cast in the representation vote be counted.

13. The matter is referred to the Registrar.

CONCURRING OPINION OF BOARD MEMBER W. H. WIGHTMAN: March 1, 1994

1. I agree with the majority decision, but wish to add the following thoughts.

2. Section 52 of the *Social Contract Act* states that its provisions takes precedent over other statutes, "but only to the extent necessary to carry out the intent and purposes of this Act". The purposes of the *Social Contract Act* are expressly set out in section 1 of the statute and relate, generally, to expenditure reduction and control. They do not include, and can be carried out without, insulating trade unions or employers from the fundamental right of employees to express their views on trade union representation. Accordingly, I would have dismissed the intervenor's allegations for the further reason that the *Social Contract Act* does not purport to take precedent over employee representation rights set out in the *Labour Relations Act*.

2916-93-M; 2957-93-U *The Great Atlantic & Pacific Company of Canada, Limited, Applicant v. United Food & Commercial Workers International Union, Locals 175 and 633, Brian Donaghy, Darrin Fay, Frank Fortunato, Rick Fox, Helmut Halla, Robert Liotti, Donald Lupton, Gene Martin, Pam Murdok, Patricia O'Doherty, Kathy Papaconstantino, Irene Park and Cliff Skinner, Responding Parties; United Food and Commercial Workers International Union, Locals 175 and 633, Applicant v. The Great Atlantic & Pacific Company of Canada Limited, Responding Party*

Picketing - Strike - Strike Replacement Workers - Right of Access - Unfair Labour Practice - Board finding that company violated section 73.1 of the *Act* by using managers from non-struck stores to perform bargaining unit work at struck locations - Board making declaration and issuing cease and desist order - Employer seeking order restricting picketing at struck locations - Board analyzing provisions of section 11.1 of the *Act* and discussing Board's dual role in protecting statutory right to picket and in limiting exercise of that right in particular circumstances - Board finding evidence insufficient to persuade it that restrictions on picketing appropriate to prevent undue disruption of employer's operations - Application under section 11.1 of the *Act* dismissed

BEFORE: *Judith McCormack*, Chair.

APPEARANCES: *C. R. Robertson, T. K. Billings, D. Van De Kamer, T. Farber and J. R. Peardon* for the company; *Kelvin Kucey* for the union.

DECISION OF THE BOARD; February 16, 1994

1. These matters are an application brought by the Great Atlantic and Pacific Company of Canada Limited under section 11.1 of the *Labour Relations Act* to impose restrictions on picketing, together with an application brought by the United Food and Commercial Workers International Union, Locals 175 and 633 alleging that the company has violated section 73.1 of the *Act* by using prohibited replacement workers. Because the matters involved perishable goods and with the assistance of counsel for both parties, the Board was able to schedule them for hearing on the day that they were filed. As a result of the urgency of the situation, the Board issued its decision with abbreviated reasons on November 25, 1993 [now reported at [1993] OLRB Rep. Nov. 1230], and indicated that further reasons would follow. This decision contains those reasons.

2. Much of the evidence in these matters was not in dispute. Both parties filed affidavit material, although the union moved to cross-examine the company's deponents. The parties were then able to agree on much of the content of the affidavits. I advised the parties I would not rely on those portions of the affidavits which were not agreed upon, and the union withdrew its motion. However, I also gave the parties an opportunity to call *viva voce* evidence, and the company called a number of witnesses.

3. The company is engaged in the business of selling retail food and grocery products through stores across Ontario under the names of Dominion, A & P and Miracle Food Mart. The employees involved in this labour dispute are represented by the union at sixty-three stores which are for the most part operated under the name of Miracle Food Mart, although there are some anomalies in this regard. The last collective agreement between the company and the union expired on June 21, 1993 and the parties entered into negotiations for a renewal agreement. Subse-

quently, the Minister of Labour indicated to the parties that he would not be appointing a conciliation board.

4. The effect of the no-Board report was that employees were in a position to legally strike and the company was entitled to lock out on Tuesday, November 16. The company had determined in advance that if there was a strike, it would not attempt to operate the struck stores using, for example, employees permitted under the replacement worker provisions of the Act. Rather, it had decided it would close the stores for the duration of the dispute. In preparation for the possibility of a strike, the company halted delivery of perishable products on Saturday, November 13th, and attempted to empty its stores of fresh products through significant price reductions on Monday, November 15.

5. However, negotiations continued and employees did not strike on either Tuesday, November 16th or Wednesday, November 17th. Although the company knew that a strike was imminent if a settlement was not reached, the company decided to restock its perishable products and on Thursday, November 18th, 1993, delivered to the stores larger than usual orders of meat, dairy goods, produce and other kinds of fresh products. Later that day, negotiations broke down. That evening, the union gave notice of a strike in accordance with the replacement worker provisions of the Act, and 6,500 employees commenced a legal strike at the sixty-three stores involved.

6. In accordance with its earlier decision, the company closed the struck stores. Employees set up picket lines at the stores, which varied in size from location to location. The company then decided to pack up the perishable products in each store and bring them out through the picket lines. These products were destined to be sold in the company's non-struck stores, returned to distributors or sent to food banks. In the process of packing up and loading those products, the company used the services of persons who ordinarily worked in non-struck stores out of its head office.

7. In sixteen of the stores, the company was successful in bringing products through the picket lines in trucks. In five stores, it was unsuccessful in doing so for reasons which will be canvassed at greater length below. In the vast majority of stores, there was either vague hearsay evidence or no evidence at all with respect to what happened.

8. The company then brought the first of these applications, requesting that the Board restrict anyone from picketing, congregating or assembling at any of the company's stores in Ontario which in anyway interfered with the peaceful removal of perishable products, or alternatively, restricting anyone from interfering with, hindering, obscuring or otherwise preventing that removal in the course of exercising their right to picket under section 11.1(3). The union responded with an application alleging that the company had violated section 73.1 of the Act by utilizing prohibited replacement workers, and requested a declaration, a cease and desist order, a posting and other relief.

9. Turning first to the application with respect to prohibited replacement workers, the union's allegations relate to the use by the company of a number of individuals to pack up and load the perishable goods at certain locations. Among other things, the evidence indicates that a secret ballot strike vote was held by the union on October 24th, 1993, and that employees voted 96% to strike. There was no dispute that notice of the strike was given to the company in writing in accordance with section 73.1(2).

10. The company's evidence disclosed that on Friday, November 19th, store manager Agostino Federigo, his assistant manager Ian Searle, the company's Health and Safety Director Keith Lampson, and an assistant manager from another store, Rob Brooks, were present in Mr. Federigo's struck store at 45 Overlea Boulevard in East York. Mr. Brooks ordinarily works at a non-

struck Dominion store in Northtown Plaza in North York and Mr. Lampson ordinarily works out of the company's head office, although he has been in the Overlea Boulevard store before, going over health and safety and giving directions in this regard. On this occasion however, Mr. Federigo, Mr. Searle, Mr. Brooks and Mr. Lampson were packing up fresh meat and produce and loading a truck with it.

11. The parties also agreed that on the same day, Joe Zukiel, a field merchandiser who ordinarily works out of the company's head office took meat and produce off the shelves and put them on dollies at a struck store at 1900 King Street West in Hamilton. The company conceded that this is the kind of work ordinarily performed by members of the bargaining unit.

12. Section 73.1 provides as follows:

73.1- (1) In this section,

“employer” means the employer whose employees are locked out or are on strike and includes an employers' organization or person acting on behalf of either of them;

“person” includes,

- (a) a person who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations, and
- (b) an independent contractor;

“place of operations in respect of which the strike or lock-out is taking place” includes any place where employees in the bargaining unit who are on strike or who are locked out would ordinarily perform their work.

(2) This section applies during any lock-out of employees by an employer or during a lawful strike that is authorized in the following way:

- 1. A strike vote was taken after the notice of desire to bargain was given or bargaining had begun, whichever occurred first.
- 2. The strike vote was conducted in accordance with subsections 74(4) to (6).
- 3. At least 60 percent of those voting authorized the strike.

(3) For the purposes of this section and section 73.2, a bargaining unit is considered to be,

- (a) locked out if any employees in the bargaining unit are locked out; and
- (b) on strike if any employees in the bargaining unit are on strike and the union has given the employer notice in writing that the bargaining unit is on strike.

(4) The employer shall not use the services of an employee in the bargaining unit that is on strike or is locked out.

(5) The employer shall not use a person described in paragraph 1 at any place of operations operated by the employer to perform the work described in paragraph 2 or 3:

- 1. A person, whether the person is paid or not, who is hired or engaged by the employer after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
- 2. The work of an employee in the bargaining unit that is on strike or is locked out.

3. The work ordinarily done by a person who is performing the work of an employee described in paragraph 2.

(6) The employer shall not use any of the following persons to perform the work described in paragraph 2 or 3 of subsection (5) at a place of operations in respect of which the strike or lock-out is taking place:

1. An employee or other person, whether paid or not, who ordinarily works at another of the employer's places of operations, other than a person who exercises managerial functions.
2. A person who exercises managerial functions, whether paid or not, who ordinarily works at a place of operations other than a place of operations in respect of which the strike or lock-out is taking place.
3. An employee or other person, whether paid or not, who is transferred to a place of operations in respect of which the strike or lock-out is taking place, if he or she was transferred after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
4. A person, whether paid or not, other than an employee of the employer or a person described in subsection 1 (3).
5. A person, whether paid or not, who is employed, engaged or supplied to the employer by another person or employer.

(7) The employer shall not require an employee who works at a place of operations in respect of which the strike or lock-out is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the agreement of the employee.

(8) No employer shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten to dismiss a person or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of the person's refusal to perform any or all the work of an employee in the bargaining unit that is on strike or is locked out.

(9) On an application or a complaint relating to this section, the burden of proof that an employer did not act contrary to this section lies upon the employer.

In accordance with section 73.1(9), the burden of proof that the company did not act contrary to section 73.1 is on the company. I note this because the evidence in some respects was relatively sketchy.

13. It was not suggested by the company that Mr. Brooks, Mr. Lampson or Mr. Zukiel were persons who were permitted to perform the work of an employee in the bargaining unit. Nor did the company take the position that it was entitled to use specified replacement workers because the situation fell within the exemptions in section 73.2. Rather, counsel ultimately made only two arguments with respect to this issue. The first was that Mr. Brooks, Mr. Lampson and Mr. Zukiel were not performing the work of striking employees when they were packing up and loading products on November 19th. In this regard the company asserted that although products would normally be packed by bargaining unit employees, it would not be in the same quantities, or involve

products with the same degree of freshness as was occasioned by the strike. For example, although there would normally be some returns of fresh meat, they would be relatively negligible. Secondly, and alternatively, if the Board found that this was the work of employees in the bargaining unit, counsel argued that in the early hours of a strike, the Board should allow a certain grace period given that there was likely to be some confusion. This was particularly appropriate in this case, counsel asserted, in view of the relative newness of the replacement worker provisions. At worst, the Board should do no more than “slap the company’s hands”. In his view, this would involve a posting, but no cease and desist order, as the union could come back to the Board any number of times if there were further violations.

14. In response, the union was of the opinion that there was no authority to support the idea of a grace period, and that the company should not get the benefit of such a dispensation in any event because the decision to parachute in other employees and managers was not made by the store managers on their own but by the highest level of company management. Counsel also argued that employees would pack up and load products of this freshness and quantity in circumstances where stores had closed for other reasons, and that thus it could not be said that this was not bargaining unit work.

15. There is no question on the evidence in this case that removing products from shelves, packing them up and loading them is work normally performed by bargaining unit employees. The argument that the work was beyond the reach of section 73.1(5)2 because of its unusual volume or degree of freshness suggests a reading of that provision which is very narrow, and one which is incongruous with the structure of sections 73.1 and 73.2. This is not to say that “the work of an employee in the bargaining unit” means only work ordinarily performed by bargaining unit employees; indeed, the contrast with section 73.1(5)3 which reads in terms of “the work ordinarily done” implies that the work of an employee in the bargaining unit may encompass a significantly broader category of work. However, at the very least it would apply to the type of work ordinarily performed by employees in the bargaining unit, and the distinctions urged upon the Board by the company in these circumstances are so fine as to be singularly unpersuasive.

16. The argument that the company should be allowed a grace period because the strike had just commenced is also less than compelling. Section 73.2(11) does in fact provide for a transition or interim period in which an employer may use employees during an emergency in circumstances where this would not normally be permitted. However, the company did not assert that it fell within this exception, and there is no evidence that it did. In this situation, it seems somewhat gratuitous and inconsistent with the organization of these provisions to read in another such period. Moreover, there was no evidence that Mr. Lampson, Mr. Brooks and Mr. Zukiel were assigned to do the work in question because the company was in a state of confusion.

17. As a result, I declared that the company had violated the Act, directed that it cease and desist from so doing, and ordered that my decision of November 25th, 1993, in this regard be posted so that it would come to the attention of employees. This determination made it unnecessary for me to address the allegations with respect to two other incidents involving replacement workers, since the remedy claimed was same in any event, and I declined to do so in the exercise of my discretion under section 91(4).

18. Moving on to the application for restrictions on picketing, section 11.1 provides as follows:

11.1-(1) This section applies with respect to premises to which the public normally has access and from which a person occupying the premises would have a right to remove individuals.

(2) Employees and persons acting on behalf of a trade union have the right to be present on premises described in subsection (1) for the purpose of attempting to persuade employees to join a trade union. Attempts to persuade the employees may be made only at or near but outside the entrances and exits to the employees' workplace.

(3) During a lock-out or lawful strike, individuals have the right to be present on premises described in subsection (1) for the purpose of picketing, in connection with the lock-out or strike, the operations of an employer or a person acting on behalf of an employer. The picketing may occur only at or near but outside the entrances and exits to the operations.

(4) No person shall interfere with the exercise of a right described in subsection (2) or (3).

(5) On application, the Board may impose such restrictions on the exercise of a right described in subsection (2) or (3) as it considers appropriate in order to prevent the undue disruption of the operations of the applicant.

(6) An application respecting the exercise or alleged exercise of a right described in subsection (2) or (3) may be made only to the Board and no action or proceeding otherwise lies at law.

(7) A party to an order made under subsection (5) may file it, excluding the reasons, in the prescribed form in the Ontario Court (General Division) and it shall be entered in the same way as an order of that court and is enforceable as such.

(8) In the event of a conflict between a right described in subsection (2) or (3) and other rights established at common law or under the *Trespass to Property Act*, the right described in those subsections prevails.

19. Section 11.1 was passed in an environment where there has been considerable growth in private space with a public character, represented by premises such as shopping malls. These provisions appear to address the resulting legal isolation of that property, which has the potential to discourage organizing or eliminate picketing as a meaningful economic sanction. Since this is the first decision issued by the Board under section 11.1, it is useful to examine this section in some detail.

20. The new provisions establish statutory rights to organize and picket, and describe the parameters of those rights. They then prohibit interference with the exercise of the new rights, although they provide for the imposition of restrictions by the Board as it considers appropriate to prevent the undue disruption of an applicant's operations. Finally, the Board is given exclusive jurisdiction over applications respecting those rights.

21. The context in which section 11.1 now operates includes an existing allocation of jurisdiction between the Courts and the Board with respect to picketing. That allocation is reflected in the decisions of the Courts under sections 101 and 102 of the *Courts of Justice Act* and the Board's decisions under section 78 of the *Labour Relations Act*. A glance at these provisions reveals significant differences in their respective structures, functions and impact:

101.-(1) In the Unified Family Court or the Ontario Court (General Division), an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

(2) An order under subsection (1) may include such terms as are considered just.

102.-(1) In this section, "labour dispute" means a dispute or difference concerning terms, tenure or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(2) Subject to subsection (8), no injunction to restrain a person from an act in connection with a labour dispute shall be granted without notice.

(3) In a motion or proceeding for an injunction to restrain a person from an act in connection with a labour dispute, the court must be satisfied that reasonable efforts to obtain police assistance, protection and action to prevent or remove any alleged danger of damage to property, injury to persons, obstruction of or interference with lawful entry or exit from the premises in question or breach of the peace have been unsuccessful.

(4) Subject to subsection (8), affidavit evidence in support of a motion for an injunction to restrain a person from an act in connection with a labour dispute shall be confined to statements of facts within the knowledge of the deponent, but any party may by notice to the party filing such affidavit, and payment of the proper attendance money, require the attendance of the deponent to be cross-examined at the hearing.

(5) An interim injunction to restrain a person from an act in connection with a labour dispute may be granted for a period of not longer than four days.

(6) Subject to subsection (8), at least two days notice of a motion for an interim injunction to restrain a person from any act in connection with a labour dispute shall be given to the responding party and to any other person affected thereby but not named in the notice of motion.

(7) Notice required by subsection (6) to persons other than the responding party may be given,

- (a) where such persons are members of a labour organization, by personal service on an officer or agent of the labour organization; and
- (b) where such persons are not members of a labour organization, by posting the notice in a conspicuous place at the location of the activity sought to be restrained where it can be read by any persons affected,

and service and posting under this subsection shall be deemed to be sufficient notice to all such persons.

(8) Where notice as required by subsection (6) is not given, the court may grant an interim injunction where,

- (a) the case is otherwise a proper one for the granting of an interim injunction;
- (b) notice as required by subsection (6) could not be given because the delay necessary to do so would result in irreparable damage or injury, a breach of the peace or an interruption in an essential public service;
- (c) reasonable notification, by telephone or otherwise, has been given to the persons to be affected or, where any of such persons are members of a labour organization, to an officer of that labour organization or to the person authorized under section 89 of the *Labour Relations Act* to accept service of process under that Act on behalf of that labour organization or trade union, or where it is shown that such notice could not have been given; and
- (d) proof of all material facts for the purpose of clauses (a), (b) and (c) is established by oral evidence.

(9) The misrepresentation of any fact or the withholding of any qualifying relevant matter, directly or indirectly, in a proceeding for an injunction under this section, constitutes a contempt of court.

(10) An appeal from an order under this section lies to the Court of Appeal without leave.

78.- (1) No person shall do any act if the person knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

(2) Subsection (1) does not apply to any act done in connection with a lawful strike or lawful lock-out.

22. Section 101 of the *Courts of Justice Act* describes the Court's power to grant injunctions, and section 102 sets out certain specific provisions with respect to injunctions in labour disputes. The substantive rights in this regime trace to a considerable degree from the common law, and a right to picket emerges largely in the breach, that is, in circumstances where picketing is not considered tortious or otherwise unlawful. Not all of this analytical framework is grounded in common law; one of the exceptions is the requirement in section 102 to demonstrate that police assistance has been unsuccessful, a provision which is notably absent in section 11.1.

23. Similarly, section 78 of the *Labour Relations Act* does not provide a statutory right to picket. Rather, it prohibits certain conduct which causes strikes and lockouts, and sweeps in picketing in certain specific circumstances as part of a larger range of such conduct.

24. In contrast, section 11.1 actually creates new substantive rights to picket and organize on certain premises (which, for the purposes of simplicity I will refer to as private property). It then protects those rights from interference and empowers the Board to impose restrictions in accordance with a specific test. Not only is this quite different from the way in which picketing has been treated at common law, even as filtered through the *Courts of Justice Act*, it may also be possible to conclude that the Act now provides a code supplanting the common law regime with respect to the premises in question. This is supported by both the comprehensive structure of section 11.1 and subsection (8) which provides that in the event of a conflict, the picketing and organizing rights prevail over the common law. In addition, it is evident that the Legislature chose not to address this issue in a manner which would have left the common law framework intact, for example, by simply amending the *Trespass to Property Act* as some provincial jurisdictions have done.

25. It is not necessary for me, however, to decide whether section 11.1 represents a complete code with respect to picketing on the premises described. It is at least clear that the question the statute directs the Board to address is whether to impose such restrictions as it considers appropriate in order to prevent the undue disruption of the applicant's operations. The effect, then, is to provide a significantly different jurisprudential context for the Board than that in which the Courts operate. Whether this test intersects at some point with a common law analysis and in what manner was not argued before me.

26. The differences in these respective provisions highlight the fact that section 11.1 takes the Board into relatively new territory. In exploring that territory, the Board must be cautious not to import jurisprudence from the Courts in an unreflective manner. It goes almost without saying that the differences among both the various provisions set out above and the common law may imply different results, depending on the situation. In addition, the Board has observed on a number of occasions that while judicial precedent may be useful in providing it with valuable insight, it is incumbent upon the Board to develop a sound and indigenous jurisprudence which reflects the complex realities of labour relations. If it did not ground its decisions in its more specific experience, the Board would be failing in its responsibility as an expert tribunal serving a distinct community. This is particularly true in an area like picketing, which is a labour relations activity with historical roots and a unique function and tradition in collective bargaining. Again, the Legislature could have addressed the problem of picketing on private property without transferring responsi-

bility for overseeing it from the Courts to the Board. The fact that it chose to assign exclusive jurisdiction to the Board reinforces the Board's obligation to draw on its particular expertise.

27. At the same time, it is clear that the Board's jurisdiction under section 11.1 is limited to picketing on the premises set out in that provision. This means that the Courts will continue to deal with picketing beyond that context. If the Board's legal territory is only one part of a larger picture, it may also be important for the Board to remain cognizant of the Court's jurisprudence so that the impact on any particular dispute can be synchronized to some degree.

28. It is in this context that the union argues that the Board's jurisdiction under section 11.1 is limited, not just to picketing on private property, but in addition only to those aspects of the picketing that relate to private property. This might include issues relating to adjacent stores, or the operations of a mall affected by the picketing. A simple dispute between an employer and unionized employees such as the instant one, which does not involve any unique features relating to private property but merely happens to be occurring on private property is still the territory of the Courts, according to counsel. The company was of the view that the Board's jurisdiction extended to all aspects of picketing on the premises described. Aside from this particular issue, the parties were in agreement that the Board had jurisdiction with respect to this matter.

29. The proposition advanced by the union in this regard is not one supported by the language of section 11.1(6), which provides that the Board has exclusive jurisdiction over "the exercise or alleged exercise of of a right described in subsection (2) or (3)". In the circumstances of the case, that right is to be present on private property for the purposes of picketing the operations of an employer in connection with a strike. There is nothing about the language or structure of these provisions which suggests that it is only certain aspects of the picketing which fall within the Board's jurisdiction. On the contrary, if the right to picket being asserted in a case is one which has its genesis in section 11.1, then subsection 11.1(6) makes it clear that the Board has the corresponding power to oversee the exercise of that right. Indeed, the fact that the Board has jurisdiction over even an alleged exercise of that right reflects that the line around the perimeter of the Board's jurisdiction is relatively broad. It is certainly true that picketing on the premises set out in section 11.1 may have repercussions with respect to third parties adjacent to the struck employer, customers or the mall owner. While it may well be that the Board's powers with respect to picketing were intended to be primarily directed to those unique features, section 11.1(4) requires us to handle the full range of picketing issues which may arise on the premises described.

30. Indeed, the distribution of jurisdiction proposed by the union would be problematic, both from the Board's point of view and from that of the labour relations community. In any one case involving private property, there might be a series of issues in dispute with respect to the picketing, some of which might relate specifically to the fact that it is occurring on private property and some of which might not. For a party to have some of those issues dealt with by the Board, and some by the Courts is likely to be unwieldy and time-consuming, a proposition which is especially troubling in light of the expedition often required in picketing cases.

31. Counsel for the union points out that if section 11.1(6) was to be read in the manner the company urges, picketers on private property might be dealt with by the Board, and picketing on other property might be addressed by the Courts, perhaps in an inconsistent manner with respect to a strike which may be occurring in a number of locations involving both public and private property. It is certainly true that that is one possible effect of the apportionment of jurisdiction created by section 11.1, and any apportionment carries with it the possibility of some inconsistency. However, as I noted above, there is already some degree of division in picketing jurisdiction. Moreover, while there may be drawbacks to the scheme formed by section 11.1 in this jurisprudential

context, the allocation proposed by counsel is no less hazardous and perhaps more so, in addition to being at odds with the plain language of section 11.1(6).

32. With this in mind, it is useful to turn to the matter of what constitutes picketing. This is not a particularly easy task. The modern picket line can involve a myriad of activities including: employees congregating, walking, standing or sitting in various formations; speeches, singing, and chanting; the use of sound equipment or other amplification; the carrying or presentation of signs, leaflets, armbands, T-shirts, hats, or jackets with various messages; effigies or other dramatic presentations; exhortations, discussions, and insults addressed to other employees, suppliers, members of management, allies and customers; the establishment and use of facilities for shelter, heat or hygienic purposes; various kinds of attempts to hamper, hinder, obstruct or delay the entry or egress of persons or goods; and the use of social pressure in a number of ways. This is not intended to be an exhaustive list by any means, nor to suggest that all such activities should be free from restriction. Rather, it simply gives some flavour of the broad range of activities which may make up labour relations picketing in the real world.

33. The purposes of picketing are likewise myriad. Generally they include social and economic pressure on an employer, allies, customers, suppliers or colleagues, soliciting support to honour the picket line or otherwise join cause with the strikers, showering opprobrium on those not in sympathy, mobilizing the strikers themselves and building morale and cohesiveness to withstand the strike, advertising and informing specific groups or the public generally of the dispute and other means of strengthening the bargaining power of strikers.

34. With such a diversity of both purpose and means, attempting to categorically define picketing is fraught with difficulties. For one thing, some of the definitional concepts emerging from other contexts are not particularly helpful here. Drawing a line around "informational" picketing, for example, does not take into account that almost all picketing has an informational character and purpose, and almost all seeks to exert pressure beyond the mere delivery of information. In addition, the parameters of picketing as a whole are blurred. Some activities, such as walking with signs, may be self-evidently picketing, while others, such as vandalism, may not, regardless of their connection to a labour dispute. Between these more clear cut examples lies a gray area. For example, if a car is parked across an access way by a picketer, does that make it picketing? Does it make a difference if the car is plastered with picket signs or is delivering a message through sound equipment? What if picketers are sitting rather than walking? What if they are staging some kind of dramatic presentation? Is a visitor to the picket line announcing messages of solidarity from other unions engaged in picketing? With such an amorphous subject matter, it is likely, and even preferable that the boundaries of what constitutes picketing will crystallize on a case by case basis. Generally speaking, however, it is also sensible for the Board to conceive of its jurisdiction in terms of a realistic appraisal of the extensive range of activities and purposes involved in picket lines.

35. A realistic approach to what constitutes picketing does not necessarily imply an unrestrained appetite for intervention by the Board. Picketing carries with it elements of freedom of expression, association and assembly, considered fundamental to the well-being of Canadian society. Among other things, it provides a grassroots means of communication for employees who may not have access to newspaper editorial columns, advertisements or other more expensive or exclusive means. Picketing is also part of a group of economic sanctions which are considered key to the scheme of collective bargaining as a whole. While such sanctions are not frequently resorted to in the overall landscape of collective bargaining, it is axiomatic that the underlying threat of such economic conflict is what drives the vast majority of uneventful negotiations and contract settlements.

To the extent that restrictions render picketing relatively toothless, the salutary effect of economic pressure is likely to be correspondingly impaired.

36. In addition, picketing is a significant aspect of the bargaining power of organized employees. There is little doubt that restrictions on picketing affect the balance of bargaining strength in a particularly direct fashion. This is a perilous venture in circumstances where bargaining strength is not capable of real measurement, and where even if it were, the appropriate balance is steeped in controversy. Moreover, the Board can only intervene in picketing to weaken the hand of a group of employees, not to strengthen it. Although this one-sided power to intervene may flow from the fact that section 11.1(3) establishes new rights for employees, that does not necessarily alleviate the problematic nature of the Board's role in this regard. Where bargaining strength can only be adjusted by the Board in such a limited fashion, considerable caution is required.

37. The employer's interests represent competing values, often described in terms of the prerogatives of private property or a common law freedom to trade considered vital to the economy. It is also true that while considerable caution is necessary, *not* intervening may have a significant impact on an employer's bargaining strength, or its ability to withstand a strike or lockout. In this sense, attempting to locate a balance between the parties' competing interests inevitably affects the balance of bargaining power as well.

38. It must be recognized, however, that the Board has not been assigned an open-ended task in this regard. For example, section 11.1 which establishes a statutory right to picket, prohibits interference with it and then stipulates that in the event of a conflict, such rights take precedence over rights established at common law or under the *Trespass to Property Act* implies some priority for picketing with respect to both private property rights and the freedom to trade. Similarly, the scheme of the Act with its prohibition against certain kinds of replacement workers also suggests that an employer's ability to operate unimpeded during a strike has been measured by the Legislature against other interests to some degree. It is obvious, as well, that the Board's authority is circumscribed by the specific provisions of section 11.1. In other words, what is left to the Board after the decisions of legislators is a considerably more modest task, but one which must be performed against this larger backdrop.

39. That task involves not only the protection of these new rights, but also an examination of the circumstances in which they may be limited. Section 11.1(5) allows the Board to impose such restrictions as it considers "appropriate in order to prevent the undue disruption of the operations of the applicant". The company submitted dictionary definitions for disruption which included "shatter, separate forcibly; interrupt flow or continuity of; to break apart; rupture; to throw into disorder or turmoil; to destroy the unity or wholeness of; to interrupt to the extent of stopping, preventing normal continuance of, or destroying; to throw into disorder; to halt or impede the movement of, procedure of, etc.; to break or burst apart".

40. However, the word "undue" makes it clear that mere disruption alone will not give rise to restrictions. Rather, it must be something which qualifies as undue disruption. Among other things, "undue" suggests a measurement of degree in relationship to some purpose or need, that is, in contrast to disruption which might be "due". Having regard to the structure of section 11.1, that purpose or need appears to be the rights set out in subsections (2) and (3). In other words, the Board's examination of undue disruption in this case must include an assessment of the degree of disruption with reference to the right to picket.

41. In this context, it is also fair to say that the qualification of "undue" reflects statutory recognition that even peaceful picketing in a labour dispute may be inherently disruptive. To attempt to eliminate all disruption would be tantamount in many situations to banning picketing

entirely, or rendering it ineffectual. Indeed, since at least one of the purposes of picketing in a labour dispute is to create social and economic pressure through disruption, the result is a dilemma which is not particularly amenable to easy reconciliation. That dilemma can be summarized by saying that the extent to which picketing is effective will often be precisely the extent to which the object of picketing will wish it to be restricted. Again, this would make the picketing right set out in subsection 11.1(3) relatively meaningless. At the same time, section 11.1 obviously contemplates that at some point on a spectrum of disruption, the granting of relief to an employer may be appropriate. Presumably an assessment of the degree of disruption for this purpose will also involve some examination of the impact of the picketing on the employer's operations.

42. In other words, the Board's application of the undue disruption test must recognize both the fundamental importance of effective picketing to the scheme of collective bargaining, and the fact that there are circumstances in which the impact of picketing upon an employer's operations will make it appropriate to grant relief to an employer. Of course, the point at which that relief arises, and the extent of that relief remain at the nub of the problem. It seems likely, however, that these matters may be more capable of resolution in the concrete circumstances of each case than in the abstract.

43. One further point in relation to subsection 11.1(5); it is also clear that the Board is not *required* to impose restrictions, even where it finds they would prevent undue disruption. By stipulating that the Board "may" impose restrictions as "it considers appropriate", a significant degree of Board discretion is injected into the section.

44. With this in mind, it is useful to turn to the parties' arguments in this regard. The company appeared to be of the view that it was entitled to conduct its business without any interference from picketing at all. Since the only thing it wished to do at this point in relation to the struck stores was to remove food from them, any hindrance whatsoever to this offered by picketing should be eliminated. This is a proposition which is not supported by the criterion of undue disruption in section 11.1. There is no question that this provision contemplates that there may be some degree of disruption which will not give rise to restrictions.

45. Similarly, in the presentation of its case, the company stressed the amount of money it would lose if it could not move the perishable products in question. It was difficult to get an accurate idea of this loss because the estimates provided by the company's evidence fluctuated considerably, to the point where its final estimates were close to double those it tendered initially. This did not inspire confidence in the reliability of those estimates. Even then, the figures provided represented the cost of the food to the company, not the current value of the food which both parties agreed was deteriorating rapidly in keeping with its perishable nature, nor how much the company could minimize its loss if it was able to remove the food. In addition, it was clear that in the overall picture, the losses would amount to only one to two days worth of sales of these kinds of products. Nevertheless, it seems likely that the company was losing a considerable sum of money invested in the perishable food. It appeared that counsel was of the view that this in itself was justification enough for restrictions on picketing.

46. The problem with such an approach is that the use of economic sanctions contemplates economic loss by the parties to a labour dispute. As the employer in this case incurs the costs of its closed operations and land-locked inventory, 6,500 employees are losing their paycheques. It is this reciprocal economic cost which the theory of collective bargaining presumes will encourage settlement. In these circumstances, the pivotal issue is not whether an applicant is losing money, or how much, but whether the Board should intervene in the dispute to lessen the cost to one side only, or weaken the other's economic weapons. This is not to suggest that the economic loss expe-

rienced by an employer is irrelevant to the issue of whether imposing restrictions is necessary to prevent undue disruption. On the contrary, economic loss might well be one of a number of significant factors in measuring undue disruption. However, the Board must not lose sight of the fact that economic loss is one of the purposes of picketing, and that the imposition of restrictions alleviating such loss are likely to undermine that purpose and interfere with the functioning of economic sanctions upon which collective bargaining is premised.

47. At this point, I note that the company requested that the perishability of the food play no role in my decision. Counsel advised that the fact that the products were deteriorating was the reason only for the expedition of the proceedings. He indicated that the application was not founded on the basis of the perishability of the products, but rather on the grounds that the company owned these products and was entitled to use its inventory as it saw fit and without interference. This was given added emphasis by the fact that the company planned to bring applications subsequently for the same kind of restrictions requested here to enable it to remove the remainder of the store's non-perishable or less perishable inventory. Counsel made it clear in these circumstances that the company did not wish my decision to turn on the issue of perishability, and it does not do so. Of course, I have considered the company's economic loss as one ingredient of my decision, regardless of whether that loss was related to the fragility of the products in question.

48. The union argued for a restrictive interpretation of "operations" which would exclude the removal of the food in question. Counsel was of the view that since the company's operations were the retail sales of food, and since the stores were closed, clearing the company's shelves in this manner could not be considered part of its normal operations.

49. The language of section 11.1 does not support such a narrow interpretation. Rather "operations" is a relatively broad word, and the argument that a retail food sales operation does not include the transfer of food for sale is not very persuasive. It is not necessary to precisely delineate the ultimate scope of "operations" for the purposes of this case; suffice it to say that I have little doubt it encompasses the movement of inventory in the circumstances before me.

50. Turning now to the evidence with respect to the picketing, it was undisputed that the company was able to remove products in sixteen stores. With respect to forty-two stores, there was no reliable evidence of anything approaching undue disruption. In this regard the company proffered only hearsay evidence to the effect that unidentified store managers at unidentified locations told the company's loss prevention manager that they had had difficulties getting trucks in and out. These difficulties were mostly unspecified. There was reference to a vehicle parked in front of a receiving bay and picketers in the bays preventing trucks from backing up to a building, but it was unclear whether these conversations actually involved the five stores described below or whether they referred to the forty-two other stores. Neither did the evidence indicate how many incidents there were of this nature, any details at all, or even whether the store managers themselves had any first hand knowledge of them.

51. A finding that restrictions are appropriate to prevent undue disruption requires more specific and reliable evidence than this. The company pleads that it was under severe time constraints in preparing this application, and that first hand evidence would have taken so much time as to render the issue moot. This does not necessarily explain why the evidence was so vague. Moreover, although such evidence might have been time-consuming, there is also some merit to the union's rejoinder that these problems stem from the fact that the company was requesting a massive order covering the province. A remedy of this scale may take longer to obtain than a less sweeping one. In any event, the fact remains that the evidence with respect to these stores is simply too weak to support the conclusion that restrictions are appropriate to prevent undue disruption.

There is no reverse onus under section 11.1, and for the Board to limit a statutory right such as this, an applicant must bring itself within the test set out in section 11.1(5).

52. This brings me to the five stores where evidence was called or agreed to in some detail. At three of the five stores, the facts are essentially the same and were agreed upon by the parties. Either on November 19th or November 20th, there was one incident at each store where a truck owned by another company approached the loading dock for the purpose of picking up perishable products. Some picketers took up positions in front of the trucks, and at two stores they refused to stand aside when asked to do so. There is no evidence of such a request at the third store. The parties agreed that each of the three trucks were "turned away" by the picket line and were therefore unsuccessful in removing perishable products. There was no indication of whether these events lasted a few minutes or longer, whether more than one request was made, and so forth. Three other incidents of unsuccessful pick-ups were referred to without any information with respect to the cause, or any circumstances or details. In these circumstances, the union referred me to *Nedco Ltd. v. Nichols et al* (1973) 3 O.R. 944 in support of the proposition that peaceful persuasion ought not to be enjoined.

53. Again, I find this evidence insufficient to persuade me that restrictions are appropriate to prevent undue disruption. There is certainly a degree of disruption, but as noted above, the Board's assessment of whether it is undue disruption must be made in a context which includes, among other things, an understanding of the nature and purposes of picketing. Because there is so little evidence with respect to the circumstances of the trucks being turned away, it is difficult to conclude that the disruption was undue in this regard. For example, the company advised the Board that the truck company drivers were themselves unionized. If what happened is that picketers simply persuaded them to honour a peaceful picket line in a lawful strike, this is a result normally contemplated by picketing. In other words, without knowing why or how the trucks were "turned away", it is difficult to conclude the disruption relied upon by the company was undue in relation to the nature and purposes of picketing.

54. Looking at it from the perspective of the impact on the company's operations, the evidence indicated that the products which could not be removed as a result amounted to three pallets in each of two stores, and eleven pallets in a third. There was no evidence as to what proportion of the whole this amounted to, the value of the products on these pallets, their degree of deterioration or the effect of these incidents on the company's operations. The only evidence that was submitted, which was with respect to the aggregate value of the perishable products, suggests that these products were a very small part, not only of the inventory as a whole, but even of the perishable products. This again makes it difficult to conclude that restrictions were appropriate to prevent undue disruption. As a result, I do not find it necessary to consider the union's argument with respect to *Nedco, supra*, or the relevance of this case in the context of section 11.1.

55. At a fourth store, the company's evidence indicated that a truck arrived for the purpose of removing the perishable products. The nine picketers at that store linked hands and blocked one of two access routes to the rear of the store. The company asked the picketers to move, and they declined. The company then instructed the truck to leave. The following day, another truck approached. There were six employees picketing at the time and a bicycle rack and a car had been placed in front of one of the two access routes to the store. The company called the police, but asked the officer who arrived only to verify the fact that a car was parked there. There is no evidence that the company asked police to intervene or speak to the picketers. It was undisputed that there was another access route and loading dock to the store, and there was no suggestion that it was blocked at any time during these events.

56. At the fifth store, a truck encountered no difficulty approaching the loading bay and was loaded with products. According to the company's evidence, during the loading process picketers parked cars in front of the truck. The mall management called police who, within a few minutes, discussed the matter with picketers, and the cars were removed. However, several picketers then stood at the front of the truck. At the time, Mr. Federigo testified, there were no problems, and the picketers were a calm, organized bunch he felt he could reason with. The picket captain was receptive to the idea of discussing an agreement with respect to the truck, and he took a proposal back to other picketers. However, this was ultimately rejected, and one of the picketers started yelling at the others not to move. A police officer tried to calm this picketer down, which worked to some extent, according to Mr. Federigo. The company asked the police to arrest the picketers, and the police declined, although they did not say they would not help in other ways. The company then decided to unload the truck, after which the truck proceeded to leave without difficulty.

57. On balance, I find that this evidence is also insufficient to persuade me that restrictions are appropriate to prevent undue disruption. With respect to the fourth store, the picketers blocked only one of two access routes for what appears to be a brief period of time on two occasions. For the fifth store, the length of time appears to have been longer, but picketers responded to some extent to the admonitions of police. Again, there was no evidence with respect to the amount or value of the goods involved at either store. Given that there are sixty-three stores on strike, evidence that there have been three incidents of this nature does not persuade me that restrictions are appropriate to prevent undue disruption to the company's operations.

58. I have reviewed the impact of the picketing on the employer's operations as a whole, because that is how the company framed its case. For example, counsel presented evidence and made arguments with respect to deliveries, quantities of products, and economic loss in regard to the stores as a group, and there was no evidence with respect to the impact on the operations of a particular store. However, I would also add that even if each store were considered on an individual basis, there was little evidence that restrictions were appropriate to prevent undue disruption. Since the stores were closed, there was no interference with the main business of sales. The events described represent a relatively small number of incidents over several days of peaceful picketing during which store managers and other personnel crossed the picket lines at the stores without apparent difficulty. Again, there was no evidence that the company's inability to remove the goods in question had any impact on the specific stores involved, as opposed to its operations as a whole.

59. It is worth observing at this point that the parties addressed the issue of whether restrictions were necessary to *prevent* undue disruption from the standpoint of incidents which had already occurred. This was a useful way of approaching the matter. Although it does not preclude the Board from coming to reasonable inferences with respect to prevention, such inferences should be based solidly on evidence, rather than representing an exercise in speculation.

60. In any event, however, I am not convinced that I should exercise my discretion under section 11.1(5) in favour of the applicant. As noted earlier, section 11.1(5) is discretionary in its import. In this case there were several factors which led me to the conclusion that I should exercise that discretion in such a manner as to not impose restrictions.

61. In the first place, the company made little attempt to utilize other means of assistance available to it, and even contributed substantially to its own difficulties. As described above, the company originally tried to prepare for a strike by emptying its shelves of perishable products. When the strike did not occur immediately, it took a calculated risk in loading up its shelves again with a larger than usual shipment, knowing full well that a strike was imminent and could occur at

any time if a settlement was not reached, with the attendant likelihood of a picket line. The company did so in spite of the fact that it had planned in advance that if a strike occurred, it would not attempt to operate any of the stores, for example, with those employees permitted under section 73.1 and 73.2, but would close down operations completely. Of course, it is not surprising that the company would wish to minimize the losses posed by its bare shelves in the absence of a strike. On the other hand, neither is it unexpected that as soon as the company loaded up its shelves, the union would find that the time was propitious to strike. This is all part of the kind of strategizing engaged in by parties involved in the legitimate use of economic sanctions. The essence of this situation is that the company gambled and lost with respect to the timing of the strike. It is not self-evident that the Board should intervene to extricate the company from difficulties it created to some degree in furtherance of its own labour relations tactics. I observe that if, for example, the union had guessed unwisely in planning its manoeuvres, the Board would not be in a position to provide it with assistance under section 11.1.

62. The evidence also indicated that the company did little to resolve the situation even after the strike commenced. For example, one of the incidents cited in support of restrictions involved the bicycle rack that was placed in front of a receiving bay. There was no suggestion that the company could not simply have removed it. Certainly there are times when action on the part of the company might contribute to problems on the picket line, and there is no doubt that restraint and level-headedness on the part of both parties to a labour dispute is critical. On the other hand, there is also some room for sensible, unprovocative activities which fall somewhere in between inertia and belligerent self-help. Similarly, in one case where a car was parked across an access route, the company requested assistance from the police, and the car was moved after their intervention. In the other case, there was no evidence that the company had even requested the assistance of the police to this effect.

63. There is no question that seeking the assistance of the police is not a condition of section 11.1, as it is under section 102 of the *Courts of Justice Act*. However, the police still have an important role to play in picketing, and the Board may consider this as a factor in the exercise of its discretion. Picket line disputes are often resolved by the parties working out compromises, for example, in which vehicles are permitted access on a limited or delayed basis, deliveries are taken through by hand, and so forth. The evidence indicates that the municipal police forces contacted by the company were prepared to respond to the company's calls, if needed, and negotiate with the strikers to try to resolve the situation. A witness for the company testified that a number of those police forces had special industrial relations divisions for handling picket lines. As the car incidents demonstrate, where police assistance was requested, it was useful, although the police were not prepared to go as far as the company wanted. Nevertheless, the company did not contact the police in the regions of twenty-three stores, and there is no evidence that they requested their assistance from the picket line except for the two instances described above. It was clear that if the police were not prepared to force open the picket lines or arrest picketers, the company was not interested in utilizing their services to see if their assistance might produce some common sense middle ground.

64. I do not doubt that the police forces of this province would be inclined to tread warily in this area in light of the statutory right and the prohibition against interference with that right established by section 11.1. At the same time, where police involvement is skilled and neutral, it can resolve a significant number of picket line problems. Moreover, municipal by-laws, and provincial and federal statutes may be relevant to certain aspects of picket line or related activity as well. In other words, cutting the police out of the picture would not be in the interests of either the labour relations community or the Board. While ready access to the Board is important in preventing the escalation of disputes, it would be imprudent to undermine the sort of practical accommodations

which are often reached by the parties in picket line situations. One result might be the kind of situation reflected at the fourth store, where the company's efforts appeared to be directed more at compiling evidence for this application than at working out some resolution. And, of course, if police assistance does not resolve the matter, this will be relevant to the Board's discretion as well. In other words, considering this factor gives both parties to a labour dispute an incentive to reason.

65. I note that it is not necessary for me to decide whether or not the placement of the cars or the bicycle rack amounts to picketing, because I am not prepared to impose restrictions in any event. For the same reason, I have not commented on the union's argument that the cases of *Nedco, supra, Blackstone Industrial Products Ltd.* (1979) 23 O.R. (2d) 529 and *Gravel & Lake Services Ltd. v. International Woodworkers of America - Canada, Local 2693 et al* (1989) 37 C.P.C. (2d) 292 stand for the proposition that some damage and interference by picketers will not be enjoined by the Courts, nor on the relevance of this caselaw to section 11.1.

66. Finally, the fact that the Board's assistance is being requested to facilitate the removal of inventory which was at least in some part prepared for removal by prohibited replacement workers in violation of the *Labour Relations Act* is also a factor in my decision. While I do not wish to overstate its significance, the absence of clean hands on the part of the company is worthy of note where the Board has discretion.

2430-92-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. **Toronto Transit Commission**, Responding Party v. Amalgamated Transit Union, Intervenor #1 v. Amalgamated Transit Union, Local 113, Intervenor #2 v. Group of Employees #1, Objectors v. Group of Employees #2, Objectors

Certification - Employee - Board concluding that Inspectors and Instructors employed by Toronto Transit Commission exercising managerial functions - Inspectors and Instructors not "employees" within meaning of the Act

BEFORE: M. Kaye Joachim, Vice-Chair, and Board Members W. H. Wightman and D. A. Patterson.

APPEARANCES: Craig Grant, Roy Rice, Rob Moluchi and Gary Fane for the applicant; Douglas K. Gray, Stephen C. Raymond, Kauita Chhiba and James Ralston for the responding party; no one appearing for Amalgamated Transit Union and Amalgamated Transit Union Local 113; Debbie Dalle Vedove for Group of Employees #1; James S. Thompson for Group of Employees #2.

DECISION OF THE BOARD; March 1, 1994

1. This is the continuation of an application for certification. The only issue dealt with in this decision is whether persons classified as Inspectors and Instructors exercise managerial functions and thus should be excluded from the bargaining unit sought by the applicant.

2. Six Inspectors were examined and one reply witness was called by the responding party. A hearing was held to entertain submissions from all parties. Written submissions were provided to

the Board in advance of the hearing by the applicant, the responding party, and the group of employees #1. All parties in attendance made oral submissions.

3. Section 1(3) of the *Labour Relations Act* provides that no person shall be deemed to be an employee who, in the opinion of the Board, exercises managerial functions.

4. The purpose of excluding persons who exercise managerial functions from collective bargaining is "to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest as between their responsibilities and obligations as managerial personnel, and their responsibilities as trade union members or employees in the bargaining unit". (*Corporation of the City of Thunder Bay*, [1981] OLRB Rep. Aug. 1121 paragraph 2)

5. In addition, the exclusion of persons who exercise managerial functions is aimed at maintaining an arms-length relationship between employees and employers. The Board has stated in *Chrysler Canada Ltd.*, [1976] OLRB Rep. Aug. 396, paragraph 12:

The identification of management is fundamental to the scheme of collective bargaining as set out in the *Labour Relations Act*. What is contemplated is an arms' length relationship between the employees represented by a bargaining agent, on the one side, and the employer acting through management on the other side. The Act attempts to create a balance of power between these two sides by insulating one from the other. ... Collective bargaining rights, therefore, are not universal, but must be qualified by the need to preserve a countervailing force on the employer side.

6. In *Ford Motor Company of Canada Limited*, [1993] OLRB Rep. Jan. 1, the Board identified further reasons for excluding managerial employees:

14. In addition to the obvious examples of conflicting interests on the shop floor, there are broader, systemic concerns which require the exclusion of "management" from participation in trade union activities. For if management personnel were treated like ordinary employees, and were free to organize or promote particular trade unions, the freedom of these *other workers* could be undermined and the independence of *their trade unions* could be jeopardized. And this problem may not be resolved merely, as here, by segregating the "supervisors" into their own bargaining unit.

15. ... Once someone is declared to be an "employee" under the Act, s/he has the same rights as other "employees" - including the right to promote or oppose a trade union and to try to influence other "employees" in that regard. ... Section 1(3)(b) not only defines who is *excluded* from the collective bargaining process; it also identifies who is *prevented* from using "managerial" authority to interfere with the collective bargaining rights of others. (emphasis in original)

7. Where a previous decision of the Board exists regarding the status of the individuals in dispute, parties can reasonably expect that the previous decision will be taken into account. The Board is unlikely to reach a different conclusion on an issue such as employee status unless there has been a change in the law or a significant change in the individual's duties and responsibilities since the matter was last considered. (*Oakwood Park Lodge*, [1980] OLRB Rep. Oct. 1501 at paragraph 22. See also *Transit Windsor*, [1991] OLRB Rep. April 565 at paragraph 37.)

8. In a previous decision of this Board (*Toronto Transit Commission*, [1967] OLRB Rep. Feb. 878) the Board found that persons classified by the Toronto Transit Commission as uniformed Inspectors exercised managerial functions:

4. Having regard to all the evidence contained in the Report of the Examiner and the representations of the parties with respect thereto, the Board finds that the uniformed Inspectors spend 100 per cent of their time supervising employees of the respondent who are currently bargained

for by the applicant and no work is performed by the uniformed Inspectors which is also performed by the persons they supervise.

5. The uniformed Inspectors have the responsibility to make effective recommendations with respect to the manner in which the work is performed, the number of persons performing the work and disciplinary matters at their discretion. The uniformed Inspectors have effective control over the Operators employed by the respondent in the performance of their work, the efficiency of the service provided by the Operators and they also are required to enforce the respondent's rules and regulations.

6. Having regard to all the functions performed by the uniformed Inspectors and especially the fact that 100 per cent of their time is devoted to supervision of employees, and having regard for the reasons for decision of the Board in the *Falconbridge Nickel Mines Limited Case*, O.L.R.B. Monthly Report, September 1966, p. 379, the Board finds that persons classified by the respondent as uniformed Inspectors and uniformed dispatchers exercise managerial functions within the meaning of section 1(3)(b) of The Labour Relations Act and are not appropriate for inclusion in any bargaining unit.

9. The Act does not contain a definition of the term "managerial functions", nor does it contain any specific criteria to guide the Board in reaching its decision. However, the Board has developed and applied various tests to determine whether an individual exercises managerial functions. The appropriate test is determined by the nature of the individual's involvement with other employees. Where the individual has a direct effect on the employment relationship, the Board will apply the "effective control test". In applying the "effective control test" the Board looks to whether the individual has, at a minimum, the authority to make effective recommendations relating to conditions of employment and therefore materially affect the economic lives of employees. (*The Cottage Hospital (Uxbridge)*, [1980] OLRB Rep. Mar. 304, paragraphs 5 and 6).

10. The factors which the Board has considered include:

- (a) the power to hire or fire, or to make effective recommendations in that regard;
- (b) the power to discipline, or make effective recommendations in that regard;
- (c) the power to grant or effectively recommend wage increases, promotions and other similar matters;
- (d) the power to enforce the rules and regulations of the organization;
- (e) whether the individuals participate on behalf of management in the grievance procedure;
- (f) the power to grant or effectively recommend time off or assign overtime;
- (g) whether the individuals have effective control over the performance of their subordinates' work and over the efficiency of the service provided by their subordinates;
- (h) the authority to make effective recommendations with respect to the manner in which their subordinates' work is performed;
- (i) whether the company has training initiatives directed at the individu-

als to involve them as part of the management team. For example, training in such areas as labour relations, employment equity, affirmative action and safety rule enforcement;

- (j) the role of the individuals in performance evaluations;
- (k) whether the individuals enjoy any of the "trappings of management" which distinguish supervisors from other employees; and,
- (l) whether the individuals have the right of access to employee information with which they are able to track employee behaviour.

Ford Motor Co., *supra*, paragraphs 27, 28, 31-34, 37, 41, 44, 51.

City of Thunder Bay, *supra*, paragraphs 3, 4.

Toronto Transit Commission, *supra*, paragraphs 4, 5.

Chrysler Can. Ltd., *supra*, paragraphs 16, 18, 19.

11. In a case such as this where the status of the "first level" of management is in question, the Board will take into account that the individuals are closely controlled from above and will operate within a framework of rules which limit the exercise of independent discretion. This is especially true where, as in this case, the employees who are supervised by the Inspectors are unionized and their rights are carefully spelled out in a collective agreement. *Ford Motor Co.*, *supra*, paragraph 22.

12. Having reviewed the legal framework, the Board will now turn to its conclusions with respect to the duties and responsibilities of Instructors and Inspectors.

Inspectors

13. The transportation department of the Toronto Transit Commission (also referred to in the decision as the "Commission" or the employer) is divided into three districts and each district has a manager. A district is sub-divided into various divisions. Each division has one superintendent, one assistant superintendent, one supervisor of Inspectors, fifteen to thirty Inspectors and three hundred to four hundred and fifty Operators.

14. Inspectors manage the day-to-day performance of Operators and ensure the quality of their work. They are relied upon by upper management to see that the bus and subway service functions smoothly.

15. Although Inspectors do not set the initial schedules of Operators, they do have the power to adjust their schedules to meet customer requirements. Inspectors can require a vehicle to operate to a different schedule or on a different route.

16. Inspectors are required to enforce the rules and regulations of the Commission. Operators are expected to obey the directions of the Inspectors. Failure to do so would be considered insubordination.

17. Inspectors can require an Operator to work overtime in order to complete his/her mileage or in emergency situations. In non-emergency situations, such as an Operator not showing up

for a shift, the Inspector can decide whether overtime is required and can offer overtime to Operators in accordance with their seniority.

18. Inspectors have the authority to grant casual time off up to a couple of hours.

19. Inspectors are not involved in hiring employees. Although their opinion may be sought on the performance of a probationary employee, there was insufficient evidence presented on the frequency of reliance on such opinions. Thus, the Board does not find that there is a power of effective recommendation at the stage of making an employee permanent. Inspectors do not have the authority to fire employees nor do they make effective recommendations with respect to firing employees. However, in cases dealing with the status of “first line” managers who supervise unionized employees, the Board has noted that the absence of a decisive role in lay-offs, recall, promotions, transfers, filling vacancies, hiring, wage increases and firing, is not determinative. *Ford Motor Co.*, *supra*, paragraphs 35, 36.

20. The authority of Inspectors to discipline Operators is central to the status of Inspectors. The six individuals examined shared varying views with respect to their power to discipline. However, having reviewed the evidence as a whole, and having considered the documentary evidence filed with respect to Inspectors’ duties and responsibilities, the Board concludes that the real dispute is not one of fact, but of perception. When viewed as a whole, the Inspectors generally agreed on the facts with respect to their power to issue warnings, but differed over their interpretations whether this power amounted to a power to discipline.

21. When an Inspector observes an infraction of company rules, policies or practices, the Inspector has the discretion to determine how to deal with the situation. The Inspector may decide to do nothing. Alternatively, the Inspector may decide to take some action on the matter. One of the options is to “speak to” the Operator about the matter. In that case the Inspector records the incident in a notebook. “Speaking to” an Operator could take the form of counselling or coaching or admonishing. This power to “speak to” an Operator was characterized by the responding party as the power to deliver an oral warning. The evidence indicated that Inspectors “spoke to” or provided oral warnings to an Operator several times before proceeding to the next step of “writing up” an Operator. “Writing up” an Inspector involves filling out a service report with respect to an infraction of company rules, practices or policies. A service report is the document that Inspectors use to record all incidents observed during their work day. On it, Inspectors primarily record matters such as route conditions or schedule changes. However, Inspectors also use these service reports to record infractions committed by the Operator, such as untimeliness or unsafe operation of a vehicle. The employer’s position was that “writing up” an Operator constitutes issuing a written warning. The evidence indicates that the service report is placed in the Operator’s personnel file and relied on as part of the employee’s record for the purpose of issuing more serious forms of discipline, including suspensions and discharge.

22. The service report is one of the many forms which Inspectors use to monitor the work performance of Operators. The “Inspector/Supervisor Vault Check” is used to record whether the Operator is removing the fare box properly. The “Operators’ Equipment Check List” is used to confirm whether Operators are using the appropriate equipment. The “Check of Vehicles Running into Division” is used to check whether Operators are completing their mileage according to schedule. “Ride Slips” are used to conduct performance appraisals.

23. In addition, Inspectors conduct plainclothes surveillance on Operators to supervise their performance, and write reports based on their observations.

24. In determining whether this authority to counsel, warn, and write up an Operator

should be considered disciplinary, the Board notes the extensive training received by Inspectors on disciplining employees. With respect to the authority to discipline, the power of choice whether to coach, counsel, correct or "let something go", is itself an indication of managerial status. *Ford Motor Co.*, *supra*, paragraph 23.

25. Whether or not "speaking to" or "writing up" an Operator can be technically defined as discipline, the Board finds that in this case it is done with such frequency and has such subsequent negative effect with respect to more serious discipline, that it is a function that is incompatible with inclusion in a bargaining unit.

26. In exceptional circumstances, two Inspectors operating jointly have the authority to instruct an Operator to cease operating the vehicle and to take the Operator to a Division Superintendent.

27. Inspectors sit on various union management committees as representatives of management. For example, Inspectors act as management representatives on the Occupational Health and Safety Committee. Further, the Inspector is the Commission representative if an Operator chooses to exercise a right to refuse unsafe work under the *Occupational Health and Safety Act*.

28. During the day, there are senior levels of supervision available to give advice and instruction to the Operators and to implement more serious forms of discipline, as necessary. However, in the evenings, the more senior members of management (apart from Transit Centre Controllers) are not immediately available.

29. Although no Operators were called to give evidence, the Inspectors, all formerly Operators themselves, gave evidence that when they had worked as Operators, they had regarded the Inspectors as their "boss". A senior member of management testified that the Commission views the Inspectors as the front-line managerial staff.

30. Inspectors are the eyes and ears of the Commission and without them, the Operators would be unsupervised. If the Inspectors are not supervising the work of Operators, then Operators would essentially be supervised by the next levels of management, Supervisor of Inspectors, Assistant Superintendents and Superintendents. The Operators would be supervised by persons with whom they very rarely have contact. As was stated in the *Ford Motor Co.* "it is difficult to accept that large numbers of employees work without any immediate 'managerial' supervision, or that 'managerial' authority flows exclusively from absentee bosses working in the industrial relations department."

31. Inspectors spend virtually all of their time supervising, and rarely perform bargaining unit work.

32. The Board has recently had the opportunity to consider whether Inspectors in the Windsor transit system are employees within the meaning of the Act. (See *Transit Windsor* [1991] OLRB Rep. April 565). The facts in this case are almost identical to the facts in the *Transit Windsor* case. In that case, the Board concluded:

35. Having considered the submissions of the parties and the evidence in its totality, the Board is of the opinion that the Operations Supervisors exercise managerial functions and should be excluded pursuant to section 1(3)(b). We are persuaded that the combination of the prominence of their supervisory function and their role in the disciplinary process, however it is labelled, create the kind of conflict of interest which the Act requires be avoided. The role of the Operations Supervisors in giving warnings, whether they are technically disciplinary or not in the sense given to that term by the arbitral jurisprudence, is neither minor, nor infrequent. ... When and

if to "write up" an Operator is within the supervisor's discretion. It follows earlier reminders on the supervisors' part. When and if to send an employee home is a judgement for the Operations Supervisor to make on the spot. The rules which the supervisors enforce are well established, and partially agreed to in the collective agreement. However, this does not make the negative effects which flow from their enforcement any less tangible. The Operations Supervisors are too regularly and too centrally involved in this process to warrant the conclusion that they are merely delivering decisions made elsewhere or that it is a function incidental to other duties. It is clear that as discipline gets more serious, the supervisors' consultation with upper management increases, ... However, we are persuaded that the role in the earlier stages of the rule enforcement process, even without the initiating role for suspensions, warrants the Supervisors' exclusion.

33. Like the Board in the *Transit Windsor* case, we too are of the opinion that Inspectors exercise managerial functions and are therefore excluded from the operation of the Act.

Instructors

34. An Instructor is an Inspector who is assigned to the Commission's operating training centre where Commission personnel are trained and evaluated.

35. An Instructor is responsible for conducting practical and classroom instructional duties in the training of operating personnel. This includes giving lectures regarding the duties and responsibilities of operating personnel, conducting practical demonstrations, observing the performance of student Operators, and conducting oral and written examinations, including practical tests on equipment and vehicle operation. An Instructor is not involved in the initial selection or hiring of new employees. However, all new employees undergo a training period under the supervision of the Instructor. The Instructor has the effective power to terminate the new employee by failing the new employee on required tests. Once a new employee/trainee has passed the initial training period, he/she is on probation for a period of one year. Input on the probationary employees' performance is sought from the Inspectors and the Instructors. Instructors make effective recommendations whether the probationer should be retained at the end of the probationary period.

36. In light of this responsibility to assess and effectively recommend the retention or dismissal of new hires and probationary employees, the Board concludes that Instructors exercise managerial functions within the meaning of the Act.

37. In conclusion, the Board finds that Inspectors and Instructors exercise managerial functions and are therefore not employees within the meaning of the Act.
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3608-93-M Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees, Local Union No. 647, Applicant v. William Neilson Ltd., Responding Party

Interim Relief - Remedies - Unfair Labour Practice - Union seeking interim reinstatement of 28 employees laid off as result of employer's decision to contract out warehousing operations - Union's delay in bringing interim relief application and other factors weighing against making interim order - Application dismissed

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *J. A. Ronson* and *R. R. Montague*.

APPEARANCES: *N. L. Jesin* and *P. Powers* for the applicant; *Doug Gilbert*, *John Mastoras*, *Ralph Robinson*, *Carl Taylor*, *Peter Newhouse* and *Barry Cooper* for the responding party.

DECISION OF LEE SHOULDICE, VICE CHAIR, AND BOARD MEMBER, J. A. RONSON;
March 10, 1994

1. This is an application for an interim order filed pursuant to section 92.1 of the *Labour Relations Act*, which by oral decision dated January 25, 1994 was denied (Board Member Montague dissenting). These are the reasons for that denial.
2. This matter relates to Board File 3607-93-U ("the main application") in which the applicant ("the union") alleges that the responding party ("the employer") has violated sections 15, 65 and 67 of the Act. In the main application the union has, amongst other things, sought the permanent reinstatement with full compensation of twenty-eight bargaining unit employees laid off as a result of the employer's decision to contract out certain warehousing functions previously performed by those bargaining unit employees. In this interim application, the union seeks interim reinstatement of the twenty-eight laid off employees pending the determination of the main application on its merits.
3. At the core of the dispute between the parties is the union's allegation that the employer, during the last round of collective agreement negotiations, made certain representations to the union regarding the possible subcontracting of warehousing functions to third parties. The union alleges that the employer has now acted contrary to those representations. On the basis of the written declarations filed with the Board, there appears to be no dispute that during the last round of collective agreement negotiations the employer raised the possibility of contracting out warehousing tasks in order to reduce the overall costs of its warehousing operations. What is in dispute between the parties is whether this issue was resolved at all and, if so, the terms upon which it was resolved. The union alleges that it responded to this employer proposal during negotiations by agreeing to a number of monetary concessions, which concessions led the employer to abandon its position on the contracting out of warehouse operations. In contrast to the union's allegations, the employer states that, failing an agreement during negotiations on an incentive-based wage structure, it communicated to the union that it would proceed to subcontract the warehousing work, and that the union's chief spokesperson responded that the employer "had to do what it had to do". The negotiations were concluded between the parties on June 14, 1993, when a Memorandum of Agreement was reached by the union and the employer.
4. On January 4, 1994, the employer's Vice-President of National Accounts and Administration advised the applicant's President that the employer would announce, on January 14, 1994, the layoff of approximately twenty-eight employees performing warehousing functions, and that

this work would be contracted out to a third party. In fact, these layoffs have now occurred, effective January 14, 1994, and effective January 17, 1994 a third party, Tibbett & Britten Group Canada Inc. ("T.B.G.C.") commenced warehousing operations for the employer. By application for interim order dated January 21, 1994, the applicant asks the Board to rescind these layoffs pending the determination of the main application on its merits.

The Law

5. Section 92.1(1) of the *Labour Relations Act*, which governs the issuance of interim orders by the Board, reads as follows:

92.1-(1) On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

Although Board jurisprudence dealing with the application of section 92.1 of the Act is still in its infancy, a review of Board decisions to date permits the identification of a number of fundamental principles and factors which the Board will apply and consider when seized with an application brought for an interim order.

6. First, and most importantly, a two-part test to determine whether an interim order should issue has been established by the Board. The first branch of the test requires the Board to be satisfied, on the basis of the written declarations before it, that an "arguable case" for the remedies requested in the main application has been made out by the applicant. As was pointed out by the Board in *Loeb Highland* [1993] OLRB Rep. Mar. 197 at paragraph 26:

... we find it most appropriate to set out as one requirement in a test for interim relief that the main application must reflect an arguable case. By this we mean that if the applicant's assertions can be established, there is at least an arguable breach of the Act, or an arguable case for a remedy within the parameters of some provision of the Act.

It is noteworthy to observe that the assessment made by the Board as to whether an "arguable case" exists for a remedy in the main application is one made by reference to the one or more declarations filed by the applicant. Consistent with the principle that interim orders should be granted in an expeditious manner, the Board's Rules of Procedure do not allow for cross-examination on the declarations filed by the parties. Accordingly, the Board is not in a position to make factual determinations in situations where the declarations of the parties disclose contradictory factual allegations. As a result, the Board will consider the first hand factual allegations made in the declaration(s) filed by the applicant. The Board assesses whether the facts described by the declarants make out at the very least an arguable case that a breach of the Act may have been committed.

7. The second branch of the test requires the Board, by reference to the written declarations of the parties, to consider the relative harms which may result from granting or not granting the interim order sought. The Board in *Morrison Meat Packers Ltd.*, [1993] OLRB Rep. Apr. 358, described this branch of the test as follows (at paragraph 18):

There must be some danger of possible significant harm to the applicant before the Board will grant the relief being sought. Furthermore, that harm must be more significant than the possible harm which may result to the responding party if the order sought is granted.

In *Tate Andale Canada Inc.*, [1993] OLRB Rep. Oct. 1019, the Board described the assessment to be made in the following terms (at paragraph 55):

... it is necessary to consider what "harm" may occur if an interim order is not granted, and

what "harm" may occur if it is granted; moreover, that assessment should be made from a labour relations perspective, having regard to the scheme and purpose of the Act, of which section 92.1 is a part. In our view, the interests to be considered include those of the employer, the union, the aggrieved employees, and other employees in the work place who might be effected [sic] by the conduct under review.

8. As noted above, Board jurisprudence dealing with the application of section 92.1 of the Act is still in its infancy. It is, accordingly, fair to say that the full range of the types or nature of the potential harms relevant for the purposes of the balancing of relative harms has not yet been determined by the Board, if it ever could be exhaustively determined. As has been noted many times before, each and every interim relief application is dependent upon the particular facts before the Board. That being so, Board decisions to date do identify some common threads which weave through interim order applications. It is clear, for example, that the power to grant interim orders should not be exercised by the Board if the harm to be avoided is purely or predominantly financial in nature. See, for example, *Morrison Meat Packers Limited*, *supra*, at paragraph 23; *Price Club Canada Inc.*, [1993] OLRB Rep. July 635 at paragraph 16; *Bryan Forde* [1993] OLRB Rep. Dec. 1296 at paragraph 35; and *Fort Erie Duty Free Shoppe Inc.*, [1993] OLRB Rep. Dec. 1307 at paragraph 24.

9. Board jurisprudence has also identified as a factor to be considered in the weighing of relative harms the effect of any delay in the bringing of the application for interim relief. Once again it is important to recognize that the effect of a delay by the applicant in the launching of an interim relief application will be considered by the Board on the particular facts before it. It is both unnecessary and unwise for the Board to set any arbitrary time frame within which an application for interim relief need be brought, as even a short delay may (or may not) be significant to the Board's decision in any particular case. We endorse, however, the observation of the Board in *Morrison Meat Packers Limited*, *supra*, at paragraph 19:

... However, given the emphasis placed on expedition in both the statute and the rules (the present matter came on for hearing within five days of the filing of the application), the Board will expect applications under section 92.1 to be filed in extremely close proximity of the events giving rise to the application. An applicant who delays undermines its own ability to convince the Board of any urgent or pressing need for interim relief. Perhaps more important, however, as the passage of time between the events giving rise to the request and its determination increases so too does the Board's ability to quickly intervene decrease. Furthermore, and at least to the extent that granting an interim order interferes with an employer's management of its enterprise, the length of time during which an employer's action has been implemented may easily impact on the harm consequent from any Board order effectively undoing that measure, even on an interim basis.

See, as well, *Bryan Forde*, *supra*, at paragraph 36.

The Parties' Positions

10. At the outset of the hearing, the Board asked counsel to address only the issue of the balance of harm should the interim relief be granted. In light of our conclusion on this arm of the test for the granting of interim relief, it was unnecessary for the Board to hear submissions from the parties with respect to the issue of "arguable case".

11. The declaration filed in support of this application, executed by the union's chief spokesperson during collective agreement negotiations, contained no description of the harm which would occur if the interim order were not granted, as is required by Rule 86 of the Board's Rules of Procedure. The applicant did, however, make in its written representations the bald submission that both the applicant and its members would suffer "irreparable harm" should the employees not

be reinstated pending the outcome of the main application. In light of this submission, the Board invited counsel for the applicant to initially address the issue of the balance of harm.

12. Counsel described the harm suffered by the union and its members as that which results from the “loss of jobs”. Counsel stated that he could not accurately anticipate how many hearing days it would take to complete the hearing of the main application and suggested that it could take as long as six calendar months before a decision on the merits was issued by the Board. Counsel argued that during that time period, the laid off employees would be without income, and that the suffering that these employees would go through as a result of being unemployed would not be capable of being remedied should the laid off employees not be temporarily reinstated by the Board.

13. Counsel indicated, in response to a question put to him by the Board, that he disagreed with the approach taken by the Board in *Morrison Meat Packers Limited*, *supra*, *Price Club Canada Inc.*, *supra*, *Bryan Forde*, *supra*, and *Fort Erie Duty Free Shoppe Inc.*, *supra*, that an interim order should not normally issue where the harm to be avoided is purely or predominantly financial in nature. Counsel reiterated that the suffering which these laid off employees will endure for the length of the layoff is not something which can be remedied by the Board. Counsel submitted that a distinction should be drawn by the Board between “termination” cases, where “fault” is often in the foreground, and “layoff” cases where the departure from employment is through no fault of the employees. Counsel further suggested that the extent of the layoff, in as much as twenty-eight employees were laid off, should also be a factor taken into account by the Board when assessing the balance of harm, as should the fact that the warehousing functions eliminated by the employer constitute a “core function” of the bargaining unit.

14. Over the objections of counsel for the employer, a majority of the Board (Board Member Ronson dissenting) allowed counsel for the union to make brief oral representations regarding the nature of the severance package being offered to laid off employees by the employer. (Employer counsel was given the opportunity to respond to those representations). The declaration signed by the employer indicated that an enhanced severance package had been offered to employees. Union counsel indicated that this offer was, in fact, open only to Friday, January 28, 1994, and that a release in which recall rights are waived is expected of each employee accepting the package. Counsel submitted that this offer constituted harm which could not ultimately be remedied by the Board hearing the main application, insofar as those employees who accept the severance package would not, arguably, be entitled to reinstatement by the Board at a later date should the main application be successful. (Counsel for the union disputed this conclusion of law but suggested that the employer would adopt such a position should the main application be successful). At the very least, counsel submitted that this offer placed the employees between a “rock and a hard place” in terms of deciding the proper course to take.

15. Employer’s counsel submitted that it was a false assertion that the loss to the employees who have been laid off could not be remedied by way of a reinstatement order, back pay for the period of the layoff, and by payment of interest on the amount of the back pay, should the employer be found on the main application to have violated the Act. Counsel cited *Tate Andale Canada Inc.*, *supra*, at paragraph 56, for the proposition that potential wage loss to aggrieved employees is the least significant factor to be taken into account by the Board. Counsel submitted that a greater labour relations issue must be shown by the union to warrant the interim order requested, and that on the evidence such an issue had not been established by the union. If reinstatement were ordered here, where only financial loss was established as the harm to be incurred by the laid off employees, counsel queried whether an interim order requesting the reinstatement of laid off employees could ever be resisted by an employer.

16. With respect to union counsel's proposed distinction between "terminations" and "lay offs", employer's counsel submitted that the distinction drawn in fact supported the *employer's* position, insofar as lay offs such as the ones before this panel of the Board (where the employer's motivation is not an issue) are typically business decisions which are not reflective of poor performance or of misconduct by the employees, the latter allegations involving a "taint" which would ordinarily merit a speedy assessment of the truth of those allegations of misconduct. Counsel submitted that the termination for alleged cause of an employee, in particular a union organizer, would cry out for more urgent relief. Counsel disputed union counsel's submission that the larger the number of employees affected by a lay off, the more preferable it is for the Board to remedy the situation on an interim basis with a reinstatement order. Counsel submitted that either the harm disclosed by the facts before the Board in any one case can or cannot be remedied through monetary compensation, and that the absolute number should be of no significance to the Board in assessing whether an interim order should issue as requested.

17. Counsel for the employer addressed the issue of harm from the employer's perspective. The employer's declaration, signed by the Vice-President of National Accounts and Administration, indicates that the following harm would result should an order for interim reinstatement be issued:

- (a) the employer will be in violation of its contract with T.B.G.C. and will be liable for all start up costs incurred by T.B.G.C. These costs total \$250,000 in equipment and real estate. As well, twenty-five employees have been hired by T.B.G.C. to perform the work;
- (b) the employer has incurred expenses by removing capital assets from its facilities as a result of the decision to contract out the warehouse work. The employer also restructured the routes and earnings of other unionized employees and entered into a commercial haulage agreement to provide haulage services to the T.B.G.C. facilities; and
- (c) the service disruptions will affect customer tolerance for same, which is already strained by the changes which have taken place to date.

Counsel submitted that the union's application for interim relief constituted a direct attempt to interfere with the employer's right to manage its operations. Counsel submitted that the current collective agreement did not contain a provision limiting the employer's right to contract work out to third parties, and that the union's application, if successful, would have the effect (at least for the interim period) of giving the union that which it could not negotiate at the bargaining table. Counsel noted that numerous grievances claiming identical relief as in the main application had been brought by the applicant against the employer.

18. Employer's counsel raised the issue of delay in the bringing of the interim application. Counsel argued that the union had exacerbated the harm accrued to the employer in the situation by delaying its application for interim relief. Counsel noted that the employer's declaration established that, on January 4, 1994, the applicant was advised of the employer's decision to lay off people effective January 14, 1994, and to contract out the warehousing functions as at January 17, 1994. The union's application was not filed until January 21, 1994, *after* the layoffs and contracting out had been effected. Counsel submitted that the union, by reason of its delay, had allowed the employer to incur significant cost liabilities and to make structural changes to the work place, both of which should militate against the granting of the interim order by the Board.

19. Counsel emphasized the extensive financial liability which the employer would incur should an interim order be granted, focusing on the facts attested to in paragraph 17 above. Counsel noted that the workplace would have to be restored by the employer to its original configura-

tion should the reinstatement order request be granted. Counsel also made submissions regarding the effect of the interim order on customer relations, submitting that significant harm would result to the employer as a result of further disruptions in customer service if the interim order requested were issued.

20. Finally, employer counsel submitted, with respect to the argument regarding the nature of the severance package raised by union counsel, that the existence of the offer made by the employer did not affect the balance of harm in this application, because the employees had the option to take or to not take the enhanced severance package offered by the employer. Those employees who are satisfied to await the outcome of the main application could do so should they so choose.

Decision

21. As noted above, on January 25, 1994, by way of oral decision a majority of the Board (Board Member Montague dissenting) dismissed this application for interim relief. The majority of the Board was of the view that the balance of harm in this case favoured the employer, taking into account the interests of the employer, the union, the employees laid off and the employees in the work place who would be affected by such an interim order.

22. In our view, the harm identified by the union and relied upon by union counsel is harm which is predominantly if not purely financial in nature. As noted above, Board jurisprudence, which we agree with, establishes the principle that harm of this nature is normally not sufficient to warrant an interim order reinstating individuals to employment. We recognize and fully appreciate that a reinstatement order, requiring payment of full compensation and interest, can compensate the laid off employees for only the pecuniary losses which result from the temporary loss of employment and that the non-monetary effects of the layoffs, which may include strain, anxiety and the numerous other stresses of unemployment, may not be fully compensated by way of the money payments which would be ordered by the Board should the main application be successful. However, to give weight to these factors would, as suggested by counsel for the employer, have the effect in most if not all cases of requiring the interim reinstatement of all terminated or laid off employees pending the determination of the merits of a main application. In our view, should the legislature have intended such a result when enacting section 92.1 of the Act it could easily have mandated that by way of clear and unambiguous language. As well, even an interim reinstatement order would not remedy all of the stresses and anxieties of the laid off employees, as the reinstatement order is a *temporary* remedy and the stresses and anxieties which result from the possibility of future layoff would still remain with the employees after the Board's order took effect. We do not in any way intend to trivialize the non-monetary consequences of layoff which often occur to employees affected by the layoff. But we do not believe that in the usual case they are an appropriate factor for consideration in the context of an application for an interim order reinstating individuals to employment.

23. On the facts of this case, we are not persuaded by union counsel's argument that the number of laid off employees should be a factor in determining the relative harm as between the parties. We agree with counsel for the responding party that the losses here, whether viewed individually or as a group, are losses of a financial nature which can be remedied by way of a Board Order in the main application should liability be established by the union. It is unnecessary for the Board to attempt to define what constitutes a 'large' layoff as opposed to a 'small' layoff, as such a process would require the drawing of lines in a somewhat arbitrary manner. Similarly, we are not persuaded that the characterization of the warehousing function as being "a core function" of the employer is of any relevance to our balancing of relative harms as between the parties. There is no

evidence before us to suggest that the warehousing function is, in fact, a "core function" of the responding party. But, assuming that the warehousing function is a "core function", the leap from that conclusion to the conclusion that significant harm would result from the failure to reinstate the laid off warehousing employees is not evident.

24. In contrast to the harm identified by the trade union, the employer has, in our view, established that significant harm will accrue to its detriment should the interim order request be granted by the Board. The employer has attested to its potential liability for breach of contract with T.B.G.C., in an amount in excess of \$250,000, should it be required to retract its current arrangements. Just as important are the various costs, inconveniences and expenses which have been incurred by the employer to transform its workplace to one which reflects the contracting out of warehouse functions, including the alteration of the routes and earnings of other employees. Should the applicant be successful on this motion, these expenses may well have to be duplicated in order to reconfigure the workplace to the "pre-contracting out" structure pending the determination of the main application. That is, should the interim order be granted as requested, the employer will nonetheless be required to maintain a warehousing function. This would require the employer to choose between one of two options - either maintain the current contracting out arrangements and continue to pay the laid off employees to perform little or no work (incurring sheer economic losses which could never be recovered, even if the application is dismissed in its entirety), or return the warehousing function to its own premises and incur the full costs of so doing. Should the main application be unsuccessful, the employer, in order to effect a contracting out of the work, would be required to incur similar costs once again assuming that T.B.G.C. (or some other contractor) was still willing to perform the work for the employer. Either option, in our view, constitutes significant harm. Although the harm is primarily financial in nature, these out-of-pocket costs could never be recovered by the employer if the main application were decided in its favour, which distinguishes these losses from the financial harm incurred by the laid off employees should the applicant be successful in the main application.

25. Linked to the above factors is what we believe to have been an excessive delay in the bringing of this application for interim relief. There is, in the usual case, an inverse relationship between the length of time taken to apply for interim relief and the ability of the Board to fashion an effective interim remedy. This case is no exception. It is not evident from the materials before the Board whether the contractual agreement between the employer and T.B.G.C. had been in force prior to January 4, 1994, the date that the employer advised the applicant of its desire to contract out the warehousing work. Common sense would suggest that the obligations between the employer and T.B.G.C. were in effect before that time. If that were the case, some of the "harm" pleaded by the employer as that which would result from the granting of the interim order requested may well have been urged upon us even if this application for interim relief had been filed with the Board immediately after notice of the proposed contracting out had been given to the Union on January 4, 1994. However, the unfortunate fact in the case before us is that the union waited for seventeen days after being advised of the effective date of the contracting out of the warehousing work before applying for interim relief. During the seventeen day period, the twenty-eight employees were laid off, and the structural changes to the workplace were effected. The potential harm to the employer of an interim order of the nature requested by the union was effectively permitted to grow significantly by reason of the union's delay. Once the promised layoffs and subcontracting were effected, with all of the attendant costs and alterations of the physical layout of the workplace, it is far more difficult for the Board to conclude, on the facts of this case, that the balance of harm rested anywhere but with the employer.

26. Finally, we deal with union counsel's argument that the time limit imposed by the employer on the ability of the laid off employees to accept the enhanced settlement package

offered to them constituted harm of an irreparable nature. In our view, no true "irreparable" harm accrues to the laid off employees from the mere tendering of such an enhanced severance package by the employer. Without a doubt, the availability of such a severance package will require the laid off employees to make some difficult choices. These individuals are, however, in no worse a position than any laid off employee who is offered a severance package with enhanced payments in exchange for a release waiving all recall rights. It would seem somewhat odd to put the employer in a significantly worse position for the purposes of an interim order application because it offered to provide enhanced severance and termination benefits to employees over and above those which must be paid pursuant to the collective agreement or the *Employment Standards Act*. Ultimately, it is up to the individual employee (taking guidance from the union, should he or she so desire) to determine whether he or she will accept the employer's enhanced severance package. Counsel for the Union during argument expressed the view that any release document executed by a laid off employee would be of no force or effect for the purpose of any remedial relief which may be ordered by the Board should the main application be successful. The remedial authority granted to the Board by virtue of section 91(4) of the *Labour Relations Act*, and in particular by section 91(4)(b) and section 91(4)(c) of the Act, would appear broad enough to permit the reinstatement of these laid off employees to employment by the Board should a violation of sections 15, 65 and/or 67 be proved, irrespective of whether a release document waiving recall rights was executed by the employees.

27. For the above reasons, we dismissed this application on January 25, 1994.

DECISION OF BOARD MEMBER R. R. MONTAGUE; March 10, 1994

1. I dissent from the decision of the majority in that on the basis of written declarations before me, an arguable case for the remedies requested in the main application has been made out by the applicant. There has been in my opinion significant harm done to the applicant, far more than purely financial in nature, but harm causing human suffering which no amount of money can buy. This is further aggravated by the responding party's declaration signed by the employer indicating that an enhanced severance package had been offered to the employees when in fact it was only open until Friday, January 28, 1994, and that a release in which recall rights are waived was expected by each employee accepting the package.

2. For these reasons, I would have granted interim relief.

1968-93-R International Union of Elevator Constructors Local No. 90, Applicant v. Windsor Elevator Service Inc., Responding Party v. Construction Workers Local 53, CLAC, Intervenor

Certification - Construction Industry - Representation Vote - Employee filing objection and asking Board to conduct new representation vote on ground that he made mistake in marking ballot - Employee alleging that instructions on ballot confusing - Board concluding that any confusion on employee's part not attributable to form of ballot or instructions given to voters - Certificates issuing

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

DECISION OF THE BOARD; March 7, 1994

1. This is an application for certification pertaining to the construction industry.
2. This application was filed on September 16, 1993. A hearing commenced on November 22, 1993 and was scheduled to continue on November 30, 1993. Prior to the continuation of the hearing, the parties agreed to the taking of a representation vote. The Board appointed a Labour Relations Officer to assist the parties in making voting arrangements. Upon receiving the Vote Arrangement Report from the Labour Relations Officer, the Board directed the taking of a representation vote in which voters would be asked to indicate whether or not they wished to be represented by the applicant or the intervenor in their employment relations with the responding party.
3. The vote was conducted on December 17, 1993. Prior to the vote, the standard Notice of Taking a Vote was sent to the responding party for posting in conspicuous locations for the benefit of voters. With the notice is a sample ballot which in this case appeared as follows:

<p>Make an "X" in the circle opposite your choice IN YOUR EMPLOYMENT RELATIONS WITH / <i>Inscrirez un "X" à côté de votre choix</i> POUR ASSURER LES RELATIONS DE TRAVAIL AVEC</p>	
<p>WINDSOR ELEVATOR SERVICE INC.</p>	
<p>DO YOU WISH TO BE REPRESENTED BY / <i>DÉSIREZ-VOUS ÊTRE REPRÉSENTÉ PAR</i></p>	
<p>Construction Workers Local 53, CLAC</p>	<input type="radio"/>
<p>OR / OU</p>	
<p>International Union of Elevator Constructors Local No. 90</p>	<input type="radio"/>

4. A Returning Officer of the Board supervised the taking of the representation vote. The Returning Officer's Report of the Vote discloses that five persons cast ballots. Three ballots were marked in favour of the applicant, one ballot was marked in favour of the intervenor and one segregated ballot was not counted.
5. Within the time for filing objections to the vote, an employee in the bargaining unit filed a complaint relating to the vote. His counsel's letter setting out the substance of his complaint reads as follows:

We are the solicitors for Michael Nagj of 207 Langlois, Apartment No. 4, Windsor, Ontario.

Mr. Nagj is an employee of Windsor Elevator Service Inc. As a result of his involvement in a representation vote on December 17, 1993, he wishes to file the following complaint before the Board.

On December 17, 1993, a representation vote was conducted at the offices of Windsor Elevator Service Inc. Four members of the bargaining unit voted on the issue of representation. The two competing trade unions were the International Union of Elevator Constructors - Local 90 (hereinafter referred to as "IUEC") and the Construction Workers Local 53, CLAC (hereinafter referred to as "CLAC"). In addition to the employer and members of the two trade unions, the vote was supervised by an officer of the Ontario Labour Relations Board.

Our client's complaint stems from the fact that he did not understand the ballot presented to him. He advises that the instructions on the ballot "mark opposite your choice" were confusing to him. He was of the view that he was to not mark his choice but rather that he was obliged to mark the "opposite" trade union to his choice. Apparently, he asked twice for instructions but was never given same.

As a result, inadvertently he voted contrary to his wishes which resulted in a three to one vote in favour of the IUEC. If his vote had reflected his true intention, it would have totally changed the result.

Mr. Nagj asks that the Board in its inherent jurisdiction, to:

1. Review the proceedings to determine their propriety and fairness;
2. Appoint an officer of the Board to investigate the proceedings and to gather evidence surrounding the vote in order to make an appropriate determination regarding the procedural fairness of the representation vote;
3. Order that the vote be retaken; and/or
4. Order that the decision in favour of the IUEC be reversed.

Mr. Nagj reserves the right to raise further allegations / complaints which may come to light as a result of the ensuing investigation.

We would ask you to kindly attend to our client's complaint at your earliest convenience. We would be pleased to attend at your convenience when and if required.

6. The Board advised the parties of this objection and requested their comments. In dealing with this objection, the Board has considered the written representations of the parties'.

7. The essence of Mr. Nagj's complaint is that he found the instructions on the ballot confusing and thought he was obliged to mark the opposite trade union to his choice. Having considered Mr. Nagj's representations, the Board is satisfied that it is appropriate in the circumstances to dismiss his objection.

8. As indicated earlier, the Notice to Employees of the Taking of a Vote is posted in the workplace as well as a sample of the actual ballot with the appropriate names filled in. Any employee who has difficulty in understanding the instructions on the ballot or the choice that he or she is requested to make has sufficient time in advance of the vote to make the necessary inquiries.

9. The type of ballot used in this case has been used by the Board in representation votes for a very long time. We are satisfied that the form of the ballot and the instructions contained therein are not ambiguous. Any confusion on the part of Mr. Nagj cannot be attributed to the form of the ballot or the instructions given to voters.

10. Mr. Nagj made a mistake in marking his ballot. The circumstances before us are not

unlike those before the Board in the the *Children's Aid Society of the Regional Municipality of Waterloo*, [1985] OLRB Rep. Dec. 1818. In that case a voter misread the question asked in a termination vote and ticked the wrong box. Although the situation in the case before us is not completely analogous, the following comments of the Board are of assistance:

5. ... The balloting is conducted in secret, so as to best ensure the free expression of the wishes of those voting. The value of this process would be totally undermined if it were open to any party to have the Board inquire into the subjective state of mind of any voter at the time of his or her vote.

6. In *RSLs Inc.*, [1982] OLRB Rep. June 921 dealt with a termination application in which there was an argument about the effect to be given to a ballot which had been "spoiled" with an indication that was neither a "yes" or "no" answer to the question posed. An employee's affidavit had been placed before the Board, and it appears the Board was invited to take the allegations in the affidavit into account in determining the effect to be given to the spoiled ballot. In that context, the Board made these observations.

3. ...The Board must determine the freely expressed wishes of the employees and there should be no encroachment upon the secrecy of the balloting. Anything other than a simple answer to the question posed, carries with it the potential for revealing employee wishes which the whole process is designed to keep secret. The Board cannot embark upon an inquiry into "what the employee really meant" without undermining the very secrecy which the voting process purports to guarantee. (See Form 69).

6. ...The Board has no inclination whatsoever to inquire into what the objecting employee "really meant" by his abstention - especially since neither the applicant nor respondent has raised any complaint about the conduct of the balloting. To undertake such inquiry would not only prejudice the secrecy of the representation vote but would also open the door to an inquiry whenever an employee seeks to explain the motivation behind his spoiled ballot. We see no reason to undertake such inquiry given the explicit instructions given to all employees and the clear and obvious choice open to them when they cast their ballot. ...

The representation vote in this case was properly conducted. The only alleged error was that of an individual voter. We feel the remarks of the Board in *RSLs Inc.*, *supra*, are equally applicable here. To them we would add the observation that if a vote could be set aside as a result of one voter's confessing that he or she misunderstood a question which is unambiguous on its face, then the Board would be obliged to consider an allegation by one voter that *other* voters misunderstood the question and voted "wrong". It is a short step from that invasion of privacy of the polling booth to an inquiry into the quality of thought devoted to the response of a voter to a question he or she did understand. An employee's entitlement to have her vote count does not and should not depend on her satisfying the Board that she knew what she was doing or made the "right choice". The voter's right to unquestioned acceptance of the choice she expresses carries with it responsibility for the choice expressed and its consequences...

11. Counsel indicates that his client twice asked for instructions but was never given same. We note that the CLAC representative commented in his written submissions that he was satisfied with the Board Officer's instructions to a voter. In any event, there has been no suggestion that the Board Officer or anyone else mislead Mr. Nagj in any way.

12. Having regard to the above we are not prepared to give the ballots cast in the vote of December 17, 1993, any significance other than the significance they have on their face.

13. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 141(1) of the Act on April

12, 1978 the designated employee bargaining agency is the International Union of Elevator Constructors.

14. On the taking of the representation vote directed by the Board more than fifty per cent of the ballots cast were cast in favour of the applicant.

15. Section 146(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in the bargaining unit and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

Therefore, pursuant to section 146(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 13 above in respect of all journeymen and apprentice elevator constructors of Windsor Elevator Service Inc., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

16. Further, pursuant to section 146(2) of the Act, a certificate will issue to the applicant trade union in respect of all journeymen and apprentice elevator constructors of Windsor Elevator Service Inc., in all other sectors of the construction industry excluding the industrial, commercial and institutional sector of the construction industry, the Counties of Essex and Kent, the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman.

17. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING FEBRUARY 1994

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

3325-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Cara Operations Limited (Respondent)

Unit: "all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders, and students by Cara Operations Limited at its Swiss Chalet Take-out and Restaurant at 900 Don Mills Road in the Municipality of Metropolitan Toronto, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager" (68 employees in unit) (*Having regard to the agreement of the parties*)

3337-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. F. G. Andriuolo Foods Inc. (Respondent)

Unit: "all persons employed as waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders, and students by F. G. Andriuolo Foods Inc. at its Swiss Chalet Take-out and Restaurant at 7240 Woodbine Avenue in the Municipality of Metropolitan Toronto, save and except Assistant Dining Room Managers and persons above the rank of Assistant Dining Room Manager" (44 employees in unit) (*Having regard to the agreement of the parties*)

3353-91-R: Ontario Nurses' Association (Applicant) v. St. Joseph's General Hospital of North Bay, Inc. (Respondent)

Unit #1: "all Registered and Graduate Nurses employed in a nursing capacity by St. Joseph's General Hospital of North Bay, Inc., save and except the Occupational Health Co-ordinator, ECG/EEG Technician, Nuclear Medicine Technologist, Unit Managers, those above the rank of Unit Manager, employees for whom any other trade union held bargaining rights as of January 17, 1992 and Registered and Graduate Nurses regularly employed for not more than 24 hours per week" (123 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see Bargaining Agents Certified subsequent to a Post-Hearing vote)

0923-92-R: Ontario Nurses' Association (Applicant) v. Para-Med Health Services Inc. (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by Para-Med Health Services Inc. in the City of Cornwall, save and except Supervisors and persons above the rank of Supervisor" (29 employees in unit)

2362-92-R: Ontario Nurses' Association (Applicant) v. Stevenson Memorial Hospital (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by Stevenson Memorial Hospital in the Town of Alliston, save and except Intake Worker, Case Manager, Mental Health Counsellor I, Director of Volunteer Services, Discharge Planner, Head Nurse, persons above the rank of Head Nurse, and persons for whom any trade union held bargaining rights as of November 10, 1992" (46 employees in unit)

2861-92-R: Ontario Nurses' Association (Applicant) v. Public General Hospital Society of Chatham (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity at Public General Hospital Society of Chatham, regularly employed for not more than 24 hours per week, save and except Unit Managers, and persons above the rank of Unit Manager" (101 employees in unit)

0041-93-R: International Brotherhood of Electrical Workers Local 586 (Applicant) v. 1010264 Ontario Ltd., operating as Ramsay Electric (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of 1010264 Ontario Ltd., operating as Ramsay Electric in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of 1010264 Ontario Ltd., operating as Ramsay Electric in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0963-93-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Zellers Inc. (Respondent) v. Grace Gibson (Objectors)

Unit: "all employees of Zellers Inc. employed at its store at 419 King Street West in the Municipality of Oshawa, save and except supervisors/group merchandisers, persons above the rank of supervisor/group merchandiser, loss prevention officers, personnel clerks, and students employed in a co-operative work program" (160 employees in unit) (*Having regard to the agreement of the parties*)

1038-93-R: United Steelworkers of America (Applicant) v. Grand & Toy Limited (Respondent)

Unit: "all employees of Grand & Toy Limited at 900 Belfast Road in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (24 employees in unit)

1419-93-R: United Steelworkers of America (Applicant) v. Everest & Jennings Canadian Ltd. (Respondent)

Unit: "all employees of Everest & Jennings Canadian Ltd., in the City of Vaughan, save and except supervisors, persons above the rank of supervisor, engineers and office, clerical and sales staff" (77 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1733-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Warren Bitulithic Limited (Respondent)

Unit: "all employees of Warren Bitulithic Limited engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors and construction labourers in all sectors of the construction industry, in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

1962-93-R: United Steelworkers of America (Applicant) v. Shelter Canadian Properties Limited (Respondent)

Unit: "all employees of Shelter Canadian Properties Limited in the Municipality of Metropolitan Toronto, save and except Administrative Assistants and persons above the rank of Administrative Assistants, Rental Agents, Recreational Aerobics Instructors and Computer Instructors" (5 employees in unit) (*Having regard to the agreement of the parties*)

2797-93-R: United Steelworkers of America (Applicant) v. Westfair Foods Ltd. (Respondent)

Unit: "all employees of Westfair Foods Ltd. in the Town of Marathon, save and except Store Manager, persons above the rank of Store Manager, and Assistant Manager" (29 employees in unit) (*Having regard to the agreement of the parties*)

3100-93-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. The Scottish Rite Club of Hamilton (Respondent)

Unit: “all employees of the Scottish Rite Club of Hamilton in the City of Hamilton, save and except the Assistant Manager, persons above the rank of Assistant Manager and all employees regularly employed for not more than 24 hours per week” (6 employees in unit) (*Having regard to the agreement of the parties*)

3311-93-R: International Brotherhood of Painters and Allied Trades (Applicant) v. Matesan’s Builders & Renovations Ltd. (Respondent)

Unit: “all painters and painters’ apprentices in the employ of Matesan’s Builders & Renovations Ltd., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of Matesan’s Builders & Renovations Ltd., in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

3363-93-R: Ontario Public Service Employees Union (Applicant) v. Kingston Preschool Centre (Respondent)

Unit: “all employees of the Kingston Preschool Centre in the City of Kingston, save and except the Executive Director, persons above the rank of Executive Director and Administrative Assistant to the Executive Director” (8 employees in unit) (*Having regard to the agreement of the parties*)

3366-93-R: United Steelworkers of America (Applicant) v. CAA Toronto and/or any of: CAA Travel Agency Ltd., CAA Toronto Services Ltd., CAA Toronto (Club), CAA Insurance (Ontario), CAA Travel, CAA Travel Agency (Toronto) Ltd. (Respondent)

Unit #1: “all employees of CAA Travel Agency (Toronto) Inc. and CAA Toronto Services Inc. working in its Travel Centres in the County of Simcoe, the Regional Municipality of York, the Municipality of Metropolitan Toronto, the Regional Municipality of Peel, the Regional Municipality of Durham and the District of Algoma, save and except Branch Managers, persons above the rank of Branch Manager, Driver Education Co-ordinators and Driver Education Instructors” (180 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of CAA Insurance Company (Ontario) working in its Travel Centres in the County of Simcoe, the Regional Municipality of York, the Municipality of Metropolitan Toronto, the Regional Municipality of Peel, the Regional Municipality of Durham and the District of Algoma, save and except Branch Managers, persons above the rank of Branch Manager, Driver Education Co-ordinators and Driver Education Instructors” (20 employees in unit) (*Having regard to the agreement of the parties*)

3412-93-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Famous Players Inc. (Respondent)

Unit: “all employees of Famous Players Inc. employed at the Eglinton Theatre in the City of Toronto, save and except the Relief Manager, persons above the rank of Relief Manager, and employees in bargaining units for which any trade union held bargaining rights as of January 4, 1994” (15 employees in unit) (*Having regard to the agreement of the parties*)

3463-93-R: Graphic Communications International Union, Local 500M - Toronto, Ontario (Applicant) v. Parker Pad and Printing Limited (Respondent)

Unit: “all employees of Parker Pad and Printing Limited in the Municipality of Metropolitan Toronto, save and except non-working foreman, persons above the rank of non-working foremen, managers, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (12 employees in unit) (*Having regard to the agreement of the parties*)

3467-93-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Famous Players Inc. (Respondent)

Unit: "all employees of Famous Players Inc. at the Gloucester 5 Cinemas in the City of Ottawa, save and except Relief Managers, persons above the rank of Relief Manager, and employees in bargaining units for which any trade union held bargaining rights on January 11, 1994" (31 employees in unit) (*Having regard to the agreement of the parties*)

3474-93-R: Ontario Public Service Employees Union (Applicant) v. Versa Services Ltd. (Respondent)

Unit: "all employees of Versa Services Ltd. employed at the Metropolitan Toronto East Detention Centre Complex in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, and persons for whom any trade union held bargaining rights as of January 10, 1994" (14 employees in unit) (*Having regard to the agreement of the parties*)

3477-93-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America U.A.W. (Applicant) v. Rehabilitation Foundation For the Disabled O/A Ontario March of Dimes (Respondent)

Unit: "all employees of Rehabilitation Foundation For The Disabled O/A Ontario March of Dimes in the City of Chatham, County of Kent, save and except Attendant Services Assistant, persons above the rank of Attendant Services Assistant, office and clerical staff" (19 employees in unit) (*Having regard to the agreement of the parties*)

3511-93-R: Brewery, General and Professional Workers' Union (Applicant) v. Brant County Community Legal Clinic (Respondent)

Unit: "all employees of the Brant County Community Legal Clinic in the City of Brantford, save and except the Executive Director, persons above the rank of Executive Director, Administrative Secretary and Staff Lawyers" (2 employees in unit) (*Having regard to the agreement of the parties*)

3512-93-R: Brewery, General and Professional Workers' Union (Applicant) v. Brant County Community Legal Clinic (Respondent)

Unit: "all Staff Lawyers of the Brant County Community Legal Clinic in the City of Brantford, save and except the Executive Director and persons above the rank of Executive Director" (2 employees in unit) (*Having regard to the agreement of the parties*)

3514-93-R: Office and Professional Employees International Union (Applicant) v. Marjorie House (Respondent)

Unit: "all employees of Marjorie House in the District of Thunder Bay, save and except Executive Director and those above the rank of Executive Director" (11 employees in unit) (*Having regard to the agreement of the parties*)

3539-93-R: Canadian Security Union (Applicant) v. Thunder Bay Security & Investigation Inc. (Respondent)

Unit: "all security guards in the employ of Thunder Bay Security & Investigation Inc. at 35 Algoma Street North (St. Joseph's Hospital) in the City of Thunder Bay, save and except supervisors and persons above the rank of supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

3543-93-R: International Brotherhood of Painters and Allied Trades (Applicant) v. Aspen Drywall Inc. (Respondent)

Unit: "all painters and painters apprentices in the employ of Aspen Drywall Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters apprentices in the employ of Aspen Drywall Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar,

and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit) (*Clarity Note*)

3544-93-R: United Food and Commercial Workers International Union, C.L.C., A.F.L. - C.I.O. (Applicant) v. Fort Erie Players Limited, c.o.b. as Jumbo Video (Respondent)

Unit: "all employees of Fort Erie Players Limited, c.o.b. as Jumbo Video in the Town of Fort Erie, save and except Managers and persons above the rank of Manager" (10 employees in unit) (*Having regard to the agreement of the parties*)

3583-93-R: Communications, Energy & Paperworkers Union of Canada (C.E.P.) (Applicant) v. Crown Heights Co-Operative Homes Inc. (Respondent)

Unit: "all employees of Crown Heights Co-Operative Homes Inc. in the City of Vaughan, save and except the Board of Directors and persons above the rank of Board of Director" (3 employees in unit) (*Having regard to the agreement of the parties*)

3589-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Federated Building Maintenance Company Limited (Respondent)

Unit: "all employees of Federated Building Maintenance Company Limited engaged in cleaning and maintenance at 200 and 220 Bloor Street East in the Municipality of Metropolitan Toronto, save and except non-working forepersons, persons above the rank of non-working foreperson, office, clerical and sales staff" (31 employees in unit) (*Having regard to the agreement of the parties*)

3609-93-R: Canadian Union of Public Employees (Applicant) v. Unionville Home Society (Respondent)

Unit: "all of the employees of the Unionville Home Society who are in the Union Villa Division, in the Town of Markham, save and except Inservice Manager, Manager of Building Services, Manager Intake and Family Services, Manager Activity Services, supervisors, persons above the rank of supervisor, professional medical staff, registered nurses, graduate nurses, and office and clerical staff" (85 employees in unit) (*Having regard to the agreement of the parties*)

3610-93-R: Canadian Union of Public Employees (Applicant) v. Ontario Hydro (Respondent)

Unit: "all security guards employed by Ontario Hydro at the Clarkson System Control Centre in the City of Mississauga, save and except supervisors, persons above the rank of supervisor and persons for whom any trade union held bargaining rights as of January 20, 1994" (5 employees in unit) (*Having regard to the agreement of the parties*)

3613-93-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Commonwealth Hospitality Ltd. c.o.b. as Ramada Inn (Respondent)

Unit: "all front desk employees of Commonwealth Hospitality Ltd. c.o.b. as Ramada Inn in the City of Sudbury, save and except supervisors, persons above the rank of supervisor, accounting and sales personnel, Secretary to the InnKeeper, security staff, Catering Coordinator, persons regularly employed for not more than 16 hours per week, students employed during the school vacation period and persons for whom any trade union held bargaining rights as of January 20, 1994" (4 employees in unit) (*Having regard to the agreement of the parties*)

3614-93-R: IWA-Canada (Applicant) v. Pembroke Planing Mill Co. Ltd. (Respondent)

Unit: "all employees of Pembroke Planing Mill Co. Ltd. in the Town of Pembroke, save and except Managers and persons above the rank of Manager" (12 employees in unit) (*Having regard to the agreement of the parties*)

3615-93-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Hallmark Housekeeping Services Inc. (Respondent)

Unit: "all employees of Hallmark Housekeeping Services Inc. at 130 Adelaide Street West in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (16 employees in unit) (*Having regard to the agreement of the parties*)

3616-93-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Empire Maintenance Industries Inc. (Respondent)

Unit: "all employees of Empire Maintenance Industries Inc. at 120 Adelaide Street West, 85 Richmond Street West and 111 Richmond Street West in the Municipality of Metropolitan Toronto, save and except forepersons and persons above the rank of foreperson" (31 employees in unit) (*Having regard to the agreement of the parties*)

3632-93-R: IWA-Canada, Local 2693 (Applicant) v. Taiga Trucking (Ontario) 1980 Inc. (Respondent)

Unit: "all employees of Taiga Trucking (Ontario) 1980 Inc. employed in and out of the District of Thunder Bay, save and except foremen, persons above the rank of foreman and mechanics" (20 employees in unit) (*Having regard to the agreement of the parties*)

3637-93-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Kensington Apartments Limited (Respondent)

Unit: "all employees of Kensington Apartments Limited, 21 Dale Avenue in the Municipality of Metropolitan Toronto, save and except Assistant Superintendent, persons above the rank of Assistant Superintendent and temporary employees" (8 employees in unit) (*Having regard to the agreement of the parties*)

3649-93-R: Canadian Security Union (Applicant) v. Thunder Bay Security & Investigation Inc. (Respondent)

Unit: "all security guards employed by Thunder Bay Security & Investigation Inc. at 189 Red River Road in the City of Thunder Bay, save and except supervisors and persons above the rank of supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

3657-93-R: Canadian Union of Public Employees (Applicant) v. Thunder Bay Physical & Sexual Assault Crisis Centre (Respondent)

Unit: "all employees of the Thunder Bay Physical and Sexual Assault Crisis Centre in the Municipality of Thunder Bay, save and except the Executive Director, persons above the rank of Executive Director and Assistant to the Executive Director" (14 employees in unit) (*Having regard to the agreement of the parties*)

3660-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Ogden Allied Services Inc. (Respondent)

Unit: "all employees of Ogden Allied Services Inc. engaged in cleaning and maintenance at 250 Bloor Street East in the Municipality of Metropolitan Toronto, save and except non-working forepersons, persons above the rank of non-working foreperson, office, clerical and sales staff" (14 employees in unit) (*Having regard to the agreement of the parties*)

3680-93-R: Canadian Security Union (Applicant) v. Thunder Bay Security & Investigation Inc. (Respondent)

Unit: "all security guards employed by Thunder Bay Security & Investigation Inc. at Maureen Street (United Grain Growers Elevator "M"), in the City of Thunder Bay, save and except supervisors and persons above the rank of supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

3683-93-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Cineplex Odeon Corporation (Respondent)

Unit: "all employees of Cineplex Odeon Corporation in the City of Guelph, save and except Assistant Manager and persons above the rank of Assistant Manager and persons in bargaining units for which any trade union held bargaining rights as of January 27, 1994" (15 employees in unit) (*Having regard to the agreement of the parties*)

3712-93-R: IWA - Canada (Applicant) v. Forestply Limited (Respondent)

Unit: “all employees of Forestply Limited at its Silvaplex Division in the Town of Gravenhurst, save and except foremen, persons above the rank of foreman, office and sales staff” (17 employees in unit) (*Having regard to the agreement of the parties*)

3713-93-R: Ontario Public Service Employees Union (Applicant) v. Leeds and Grenville Youth Custody Services/Brittannia House (Respondent)

Unit: “all employees of Leeds and Grenville Youth Custody Services/Brittannia House in the City of Brockville, save and except Assistant Director and persons above the rank of Assistant Director” (11 employees in unit) (*Having regard to the agreement of the parties*)

3723-93-R: Canadian Brotherhood of Railway, Transport and General Workers (Applicant) v. The Salvation Army, Ottawa Booth Centre (Respondent)

Unit: “all employees of The Salvation Army, Ottawa Booth Centre at its Recycling Departments’ Distribution Division in the Regional Municipality of Ottawa-Carleton, save and except supervisors, persons above the rank of supervisor, administrative staff employed in a confidential capacity, office and clerical staff, residential program clients used for ad hoc shifts/special programs and clients assigned work through The Salvation Army Corrections Department for court-ordered work assignments, and the telephone operator/dispatcher co-ordinator” (36 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3727-93-R: Canadian Union of Professional Security-Guards (Applicant) v. Silhouette Security Systems Inc. (Respondent)

Unit: “all employees of Silhouette Security Systems Inc., in the Municipality of Metropolitan Toronto, the Regional Municipality of York and in the Regional Municipality of Peel, save and except supervisors, persons above the rank of supervisor, office and sales staff” (26 employees in unit) (*Having regard to the agreement of the parties*)

3738-93-R: Ontario Public Service Employees Union (Applicant) v. Children’s Aid Society of the County of Kent (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Children’s Aid Society of the County of Kent in the City of Chatham, save and except Managers, persons above the rank of Manager and the Administrative Assistant” (35 employees in unit) (*Having regard to the agreement of the parties*)

3739-93-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Crown Ridge Health Care Services Inc. c.o.b. as Crown Ridge Place Nursing Home (Respondent)

Unit: “all employees of Crown Ridge Health Care Services Inc. c.o.b. as Crown Ridge Place Nursing Home employed as Registered Nursing Assistants in the Town of Trenton, save and except supervisors and persons above the rank of supervisor” (4 employees in unit) (*Having regard to the agreement of the parties*)

3760-93-R: Ontario Nurses’ Association (Applicant) v. Community Life Care Inc. c.o.b. as Community Nursing Home, Port Perry, Ontario (Respondent) v. Group of Employees (Objectors)

Unit: “all registered and graduate nurses employed in a nursing capacity by Community Life Care Inc. c.o.b. as Community Nursing Home, Port Perry, Ontario in the Township of Scugog, save and except the Director of Nursing and persons above the rank of Director of Nursing” (9 employees in unit) (*Having regard to the agreement of the parties*)

3761-93-R: United Steelworkers of America (Applicant) v. Oakdale Cleaners and Maintenance Ltd. (Respondent)

Unit: “all employees of Oakdale Cleaners and Maintenance Ltd. in the City of Guelph, save and except

supervisors and persons above the rank of supervisor" (7 employees in unit) (*Having regard to the agreement of the parties*)

3764-93-R: Labourers' International Union of North America, Local 1089 (Applicant) v. R & K Germain Holdings Limited (Respondent)

Unit: "all employees of R & K Germain Holdings Limited operating as Servicemaster of Lambton County at 265 North Front Street in the City of Sarnia, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit) (*Having regard to the agreement of the parties*)

3805-93-R: Canadian Security Union (Applicant) v. Wackenhut of Canada Limited (Respondent)

Unit: "all security guards in the employ of Wackenhut of Canada Limited at 120 Sinnott Road in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (2 employees in unit) (*Having regard to the agreement of the parties*)

3806-93-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Cineplex Odeon Corporation (Respondent)

Unit: "all employees of Cineplex Odeon Corporation in the City of Sudbury, save and except Assistant Manager and persons above the rank of Assistant Manager, and persons in bargaining units for which any trade union held bargaining rights as of February 7, 1994" (12 employees in unit) (*Having regard to the agreement of the parties*)

3830-93-R: Ontario Public Service Employees Union (Applicant) v. Women's Shelter of Georgina Inc. (Respondent)

Unit: "all employees of Women's Shelter of Georgina Inc. in the Town of Georgina, save and except Supervisors, persons above the rank of Supervisor and Administrative Assistant" (8 employees in unit) (*Having regard to the agreement of the parties*)

3848-93-R: Ontario Nurses' Association (Applicant) v. Beacon Hill Lodges Inc. (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by Beacon Hill Lodges Inc. in the Town of Bradford, save and except the Director of Nursing, persons above the rank of Director of Nursing, and employees in bargaining units for which any trade union held bargaining rights as of February 9, 1994" (7 employees in unit) (*Having regard to the agreement of the parties*)

3929-93-R: United Food and Commercial Workers International Union, C.L.C., A.F.L. - C.I.O. (Applicant) v. Enterprise Property Group Limited (Respondent)

Unit: "all employees of Enterprise Property Group Limited at Highland Hills Mall, 875 Highland Road West in the City of Kitchener, save and except Operations Manager, persons above the rank of Operations Manager and office and clerical staff" (8 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2805-93-R: Canadian Union of Public Employees (Applicant) v. The Mississauga Hospital (Respondent)

Unit: "all employees of The Mississauga Hospital in the City of Mississauga, save and except supervisors, co-ordinators and assistant foremen and persons above the rank of supervisor, co-ordinator and assistant foreman, professional medical staff, registered and graduate nurses, paramedical staff, office and clerical staff and employees for whom any trade union held bargaining rights on the date of application, November 10, 1993" (334 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	367
Number of persons who cast ballots	250
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	250

Number of spoiled ballots	4
Number of ballots marked in favour of applicant	125
Number of ballots marked against applicant	121

3368-93-R: Canadian Union of Public Employees (Applicant) v. Canadian Mental Health Association, Windsor-Essex County Branch (Respondent)

Unit: "all employees of the Canadian Mental Health Association, Windsor-Essex County Branch in Essex County, save and except the Co-ordinator of S.T.R.I.V.E., the Supervisor 24 hour support, persons above the rank of the Co-ordinator of S.T.R.I.V.E. and the Supervisor 24 hour support, the Administrative Assistant and the Secretary to the Executive Director" (51 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	52
Number of persons who cast ballots	46
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	46
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	16

3409-93-R: United Steelworkers of America (Applicant) v. Crown Cork & Seal Canada Inc. (Respondent) v. Sheet Metal Workers' International Association, Local Union 286 (Intervener)

Unit: "all employees of Crown Cork & Seal Canada Inc., in Chatham, Ontario, save and except supervisors, persons above the rank of supervisor, office, technical and sales staff, nurses and security guards" (125 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	125
Number of persons who cast ballots	108
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	108
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	78
Number of ballots marked in favour of intervener	29

3428-93-R: Canadian Union of Public Employees (Applicant) v. Victorian Order of Nurses Windsor-Essex County Branch (Respondent) v. Ontario Nurses' Association (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of the Victorian Order of Nurses Windsor-Essex County Branch in the City of Windsor and the County of Essex, save and except supervisors, persons above the rank of supervisor, office and clerical staff and persons employed in the home care programme" (225 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	250
Number of persons who cast ballots	192
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	92

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

3353-91-R: Ontario Nurses' Association (Applicant) v. St. Joseph's General Hospital of North Bay, Inc. (Respondent)

Unit #1: (see Bargaining Agents Certified without vote)

Unit #2: "all Registered and Graduate Nurses regularly employed in a nursing capacity by St. Joseph's General Hospital of North Bay, Inc., for not more than 24 hours per week, save and except the Occupational Health Co-ordinator, ECG/EEG Technician, Nuclear Medicine Technologist, Unit Managers, those above

the rank of Unit Manager and employees for whom any other trade union held bargaining rights as of January 17, 1992" (64 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	74
Number of persons who cast ballots	39
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	36
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of ballots marked in favour of applicant	36
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	3

Applications for Certification Dismissed Without Vote

0466-91-R: United Food and Commercial Workers International Union, C.L.C., A.F.L., C.I.O. (Applicant) v. The Homewood Sanitarium of Guelph Ontario limited c.o.b. as Homewood Health Centre (Respondent) (68 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1947-93-R: Independent Paperworkers of Canada Local 2 (Applicant) v. The Beaver Wood Fibre Company Limited (Respondent) v. Communications, Energy and Paperworkers Union of Canada, C.L.C. and its Local 192 (Intervener)

Unit #1: "all employees of The Beaver Wood Fibre Company Limited employed in the following positions: Purchasing Agent, Sales and Production Scheduler, Head Timekeeper, Accounts Payable Clerk, Computer Operator, Receptionist/Typist." (5 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	0
Number of ballots marked in favour of intervener	4

3325-93-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Kaffa Ltd. carrying on business as Young Lok Restaurant (Respondent)

Unit #1: "all employees of Kaffa Ltd. carrying on business as Young Lok Restaurant in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, reservations staff and telephone operators" (70 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	67
Number of persons who cast ballots	61
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	61
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	50

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1715-91-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Goodfellow Construction Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Goodfellow Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of Goodfellow Construction Inc. in all other sectors within

a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

Number of names of persons on revised voters' list	17
Number of persons who cast ballots	16
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	10

1139-93-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Cichon Enterprises Limited c.o.b. as Imperial Dust Control (Respondent)

Unit: "all employees of Cichon Enterprises Limited c.o.b. as Imperial Dust Control in the City of Welland, save and except supervisors, persons above the rank of supervisor, sales, office and clerical staff, students employed during the school vacation period, and persons for whom any trade union held bargaining rights as of July 2, 1993" (8 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	5

3244-93-R: Canadian Brotherhood of Railway, Transport and General Workers (Applicant) v. Waterloo Dodge - Chrysler Ltd. (Respondent)

Unit: "all employees of Waterloo Dodge - Chrysler Ltd. in the City of Waterloo, save and except foremen, persons above the rank of foreman, new and used car salespersons" (28 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	28
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	28
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	17

3317-93-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Famous Players Inc. (Respondent)

Unit: "all employees of Famous Players Inc. at its Uptown Theatre in the Municipality of Metropolitan Toronto, save and except Assistant Managers, persons above the rank of Assistant Manager, and employees in bargaining units for which any trade union held bargaining rights as of December 20, 1993, the date of application" (27 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	40
Number of persons who cast ballots	28
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	27
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	15

Applications for Certification Withdrawn

3764-92-R: United Steelworkers of America (Applicant) v. Pinkerton's of Canada Limited (Respondent)

1568-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Elgin Construction, a Division of 969774 Ontario Limited, Elgin Construction, a Division of 743570 Ontario Limited (Respondents)

2696-93-R: The International Union of Bricklayers and Allied Craftsmen Local 1 (Applicant) v. Fosbel Inc. (Respondent)

2945-93-R: United Food and Commercial Workers International Workers, Local 175 (Applicant) v. Mar-Brite Foods Co-Operative Inc. (Respondent)

2988-93-R: United Steelworkers of America (Applicant) v. Mother Tucker's Food Experience (Canada) Inc. (Respondent)

3066-93-R: United Steelworkers of America (Applicant) v. D. F. Wright and Company Limited, c.o.b. as Canadian Tire (Respondent) v. Group of Employees (Objectors)

3505-93-R: United Steelworkers of America (Applicant) v. 913719 Ontario Ltd. c.o.b. as Adults Only Video (Respondent)

3506-93-R: United Steelworkers of America (Applicant) v. 913719 Ontario Ltd. c.o.b. as Adults Only Video (Respondent)

3507-93-R: United Steelworkers of America (Applicant) v. 913719 Ontario Ltd. c.o.b. as Adults Only Video (Respondent)

3508-93-R: United Steelworkers of America (Applicant) v. 913719 Ontario Ltd. c.o.b. as Adults Only Video (Respondent)

3509-93-R: United Steelworkers of America (Applicant) v. 913719 Ontario Ltd. c.o.b. as Adults Only Video (Respondent)

3510-93-R: United Steelworkers of America (Applicant) v. 913719 Ontario Ltd. c.o.b. as Adults Only Video (Respondent)

3619-93-R: IWA - Canada (Applicant) v. Wilberforce Veneer (Respondent)

3646-93-R: United Steelworkers of America (Applicant) v. Distinctive Designs Furniture Inc. (Respondent)

3669-93-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Cablecom International Network Cabling Inc. (Respondent)

3686-93-R: Labourers' International Union of North America, Local 506 (Applicant) v. Hanna Design (Respondent)

3865-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

3885-93-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Talisman Mountain Resort Ltd. (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

1093-93-R: Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (CLC, AFL-CIO) (Appli-

cant) v. The Thomson Newspapers Company Limited and Financial Times Corporation Limited (Respondent) (*Granted*)

1709-93-R: Canadian Union of Public Employees and its Local 2451 (Applicant) v. Marriott Corporation (at Carleton University) (Respondent) (*Granted*)

1945-93-R: Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. Metroland Printing, Publishing and Distributing Ltd. (Respondent) (*Granted*)

3733-93-R: 1020311 Ontario Inc. operating as Skyline Airport Tower and Hotel (Applicant) v. Hotel Employees, Restaurant Employees Union, Local 75 of the Hotel Employees', Restaurant Employees' International Union (Respondent) (*Granted*)

3930-93-R: Crown Ridge Place Nursing Home (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2191-92-R: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Stewart & Hinan Contractors Limited, Stucor Construction Ltd., David J. Harvey, Dennis R. Kowalchuk and Vernon R. Thorpe c.o.b. as Merit Contractors of Niagara (Respondents) (*Dismissed*)

2192-92-R: Labourers International Union of North America, Local 837 (Applicant) v. Stewart & Hinan Contractors Limited, Stucor Construction Ltd., David J. Harvey, Dennis R. Kowalchuk and Vernon R. Thorpe c.o.b. as Merit Contractors of Niagara (Respondents) (*Dismissed*)

2193-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Stewart & Hinan Contractors Limited, Stucor Construction Ltd., David J. Harvey, Dennis R. Kowalchuk and Vernon R. Thorpe c.o.b. as Merit Contractors of Niagara (Respondents) (*Dismissed*)

2581-92-R: Communications, Energy and Paperworkers Union of Canada, Local 521 (Applicant) v. Groupe Schneider S.A., Schneider Canada Inc., Merlin Gerin Ltd. (Federal Pioneer Division), and Square D Company of Canada (Respondents) (*Granted*)

1092-93-R: Southern Ontario Newspaper Guild Local 87, The Newspaper Guild (CLC, AFL-CIO) (Applicant) v. The Thomson Newspapers Company Limited and Financial Times Corporation Limited (Respondents) (*Granted*)

2670-93-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Aberfoyle Steel Incorporated (Respondent) (*Withdrawn*)

3110-93-R: International Brotherhood of Electrical Workers, Local Union 1687 (Applicant) v. Anmar Mechanical and Electrical Contractors Ltd. and Systems Integration Inc. (Respondents) (*Withdrawn*)

3129-93-R: Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Applicant) v. 375901 British Columbia Ltd. c.o.b. as The Westin Harbour Castle and Grand Yatt Dynasty Restaurants Inc. c.o.b. as Grand Yatt Dynasty Chinese Restaurant (Respondents) (*Withdrawn*)

3523-93-R: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Ritin Construction Ltd. and Melin Interior Systems Inc. (Respondents) (*Granted*)

3524-93-R: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Queenslea Drywall and Acoustics Limited and Kingsley Drywall and Acoustics Inc. (Respondents) (*Granted*)

3536-93-R: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Helm Interior Ltd. and Helm Bros. Contracting Ltd. (Respondents) (*Granted*)

3620-93-R: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Findlay-Jones Insulation Limited and FJ Construction Ltd. (Respondents) (*Withdrawn*)

3630-93-R: International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. Lakeview Painting (1990) Limited, Interior Building Supplies Company Ltd., Industrial Coatings & Equipment Ltd., and 957448 Ontario Inc. c.o.b. as 448 Services (Respondents) (*Granted*)

3653-93-R: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Lavern Asmussen Ltd. and Lavern Asmussen (1991) Inc. (Respondents) (*Withdrawn*)

3744-93-R: United Steelworkers of America (Applicant) v. CAA Travel Agency (Toronto) Inc., CAA Insurance Company (Ontario), CAA Toronto Services Inc. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

2191-92-R: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Stewart & Hinan Contractors Limited, Stucor Construction Ltd., David J. Harvey, Dennis R. Kowalchuk and Vernon R. Thorpe c.o.b. as Merit Contractors of Niagara (Respondents) (*Dismissed*)

2192-92-R: Labourers International Union of North America, Local 837 (Applicant) v. Stewart & Hinan Contractors Limited, Stucor Construction Ltd., David J. Harvey, Dennis R. Kowalchuk and Vernon R. Thorpe c.o.b. as Merit Contractors of Niagara (Respondents) (*Dismissed*)

2193-92-R: International Union of Operating Engineers, Local 793 (Applicant) v. Stewart & Hinan Contractors Limited, Stucor Construction Ltd., David J. Harvey, Dennis R. Kowalchuk and Vernon R. Thorpe c.o.b. as Merit Contractors of Niagara (Respondents) (*Dismissed*)

2670-93-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Aberfoyle Steel Incorporated (Respondent) (*Withdrawn*)

3110-93-R: International Brotherhood of Electrical Workers, Local Union 1687 (Applicant) v. Anmar Mechanical and Electrical Contractors Ltd. and Systems Integration Inc. (Respondents) (*Withdrawn*)

3129-93-R: Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Applicant) v. 375901 British Columbia Ltd. c.o.b. as The Westin Harbour Castle and Grand Yatt Dynasty Restaurants Inc. c.o.b. as Grand Yatt Dynasty Chinese Restaurant (Respondents) (*Withdrawn*)

3523-93-R: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Ritin Construction Ltd. and Melin Interior Systems Inc. (Respondents) (*Granted*)

3524-93-R: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Queenslea Drywall and Acoustics Limited and Kingsley Drywall and Acoustics Inc. (Respondents) (*Granted*)

3536-93-R: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Helm Interior Ltd. and Helm Bros. Contracting Ltd. (Respondents) (*Granted*)

3617-93-R: Participation Apartments - Metro Toronto (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, Local 40 and Service Employees International Union, Local 204 affiliated with SEIU, AFL, CIO, CLC (Respondents) (*Withdrawn*)

3620-93-R: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Pro-

vincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Findlay-Jones Insulation Limited and FJ Construction Ltd. (Respondents) (*Withdrawn*)

3630-93-R: International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. Lakeview Painting (1990) Limited, Interior Building Supplies Company Ltd., Industrial Coatings & Equipment Ltd., and 957448 Ontario Inc. c.o.b. as 448 Services (Respondents) (*Granted*)

3653-93-R: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Lavern Asmussen Ltd., Lavern Asmussen (1991) Inc. (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS (SUCCESSOR STATUS)

3575-93-R: United Textile Workers of America (Applicant) v. Fortune Footwear, Division of Susan Shoe Industries Limited (Sonatex) (Respondent) (*Dismissed*)

SECTION 64.2 - SUCCESSOR RIGHTS/CONTRACT SERVICES

3634-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Beutel, Goodman & Company Ltd., c.o.b. as 547495 Ontario Limited, and City Centre Management Inc. (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1819-93-R: The Canadian Stage Corporation, c.o.b. under the firm name and style of The Canadian Stage Company (Applicant) v. The International Alliance of Theatrical Stage Employees and Motion Picture Machine Operators of the United States and Canada, Local 58, Toronto (Respondent)

Unit: "all stage employees employed by the Applicant at the Toronto Free Theatre, 26 Berkeley Street in the Municipality of Metropolitan Toronto, save and except stage managers and persons above the rank of stage manager" (2 employees in unit) (*Dismissed*)

2106-93-R: Studebakers Employees (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) v. 968684 Ontario Inc. c.o.b. as Studebakers (Intervener)

Unit: "all employees of 968684 Ontario Inc. employed at Studebakers in the Municipality of Metropolitan Toronto at 150 Pearl Street, save and except supervisors, persons above the rank of supervisor, office and accounting staff, D.J.'s and students employed during the school vacation period" (23 employees in unit) (*Dismissed*)

3232-93-R: Jiri Chvatal (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 303 (Respondent) v. Unicell Ltd. (Intervener)

Unit: "all employees of Unicell Ltd. in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff" (32 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	32
Number of persons who cast ballots	30
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	30
Number of spoiled ballots	2
Number of ballots marked in favour of respondent	9
Number of ballots marked against respondent	19

3309-93-R: Ronald J. Meyer (Applicant) v. Retail, Wholesale Canada, Canadian Service Sector Division of

the United Steelworkers of America, Local 1688 (Respondent) v. Hamilton Yellow Cab Company Limited and Transportation Unlimited Inc. (Intervener)

Unit: "all drivers employed by Hamilton Yellow Cab Company Limited and Transportation Unlimited Inc. who drive a taxi cab either on a commission or leased shift basis, or for wages, save and except supervisors, garage, office and dispatch staff, and persons above the rank of supervisor" (31 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	46
Number of persons who cast ballots	29
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	29
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	28

3393-93-R: Carlos A. Teixeira (Applicant) v. United Plant Guard Workers of America Local 1956 (U.P.G.W.A.) (Respondent) v. Scott D. Avery (Company) Ltd. (Intervener) (*Withdrawn*)

3448-93-R: Richard Deschamps (Applicant) v. Teamsters Local 91 (Respondent) v. Farley Windows Inc. (Intervener) (*Withdrawn*)

3527-93-R: Janice E. Reid (Applicant) v. NELPA (Northern Electric London Professional Association) (Respondent) (*Withdrawn*)

3548-93-R: Cindy Ward (Applicant) v. Southern Ontario Newspaper Guild, Local 87 (Respondent) v. Thomson Newspapers Company Limited c.o.b. as Free Press (Intervener) (*Withdrawn*)

3611-93-R: William R. Elliott (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 1917 (Respondent)

Unit: "all employees of VME Equipment of Canada Ltd. in the City of Guelph, save and except supervisors, persons above the rank of supervisor, office staff and sales staff" (163 employees in unit) (*Dismissed*)

3765-93-R: Janice E. Reid P. Eng. (Applicant) v. NELPA (Northern Electric London Professional Association) (Respondent) v. Northern Telecom Canada Limited (Intervener) (*Withdrawn*)

REFERRAL FROM MINISTER (SECTION 109)

1549-93-M: The United Steelworkers of America (Applicant) v. Birchmere Retirement Residence (Respondent) (*Withdrawn*)

3127-93-M: London Terminal Employees' Association (Applicant) v. Suncor, Sunoco Group, Sunoco Inc. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

3111-91-U: Canadian Textile and Chemical Union (Applicant) v. The Peel County Restaurant (Respondent) (*Dismissed*)

APPLICATIONS CONCERNING REPLACEMENT WORKERS

3574-93-U: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. The Hydro-Electric Commission of the City of Ottawa (Respondent) (*Dismissed*)

3835-93-U: United Textile Workers of America (Applicant) v. Fortune Footwear, Division of Susan Shoe Industries Limited (Sonatex) (Respondent) (*Dismissed*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2899-91-U: Elio Puopolo (Applicant) v. Bricklayers, Masons Independent Union of Canada (Local 1), Muia Bros Construction (Respondents) (*Dismissed*)

3112-91-U: Canadian Textile and Chemical Union (Applicant) v. The Peel County Restaurant (Respondent) (*Dismissed*)

3705-91-U: Robert Kenney (Applicant) v. Ford Motor Company of Canada Limited (Respondent) (*Withdrawn*)

0418-92-U: Peter Dyer (Applicant) v. C.A.W. Local 222 General Motors Unit (Respondent) v. General Motors of Canada Limited (Intervener) (*Dismissed*)

2801-92-U: Kevin Fudge (Applicant) v. Teamsters Local 938 (Respondent) (*Withdrawn*)

3523-92-U: Local 235 Ontario Public Services Employees Union (Applicant) v. Grey Bruce Regional Health Centre (Respondent) (*Withdrawn*)

3565-92-U: Ontario Public Service Employees Union (Applicant) v. Bruce Peninsula Health Services (Respondent) (*Withdrawn*)

0008-93-U: Teamsters Local Union 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs Warehousemen and Helpers of America (Applicant) v. McIntosh Limousine Service Ltd., Air Cab Limousine Services (1985) Ltd., Aaroprt Limousine Service Ltd. (Respondents) (*Terminated*)

0055-93-U: Southern Ontario Newspaper Guild (Applicant) v. Thomson Newspapers Company Limited, The Daily Mercury, a division of Thomson Newspapers Company Limited (Respondents) (*Withdrawn*)

1421-93-U: Julius S. Kovacs (Applicant) v. D. D. M. Plastics (Respondent) v. International Assoc. of Machinists (Intervener) (*Withdrawn*)

1537-93-U: Service Employees' Union, Local 478 (Applicant) v. St. Joseph's General Hospital, Elliot Lake (Respondent) (*Withdrawn*)

1591-93-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 456 (Applicant) v. Partek Insulations Ltd. (Respondent) (*Withdrawn*)

1698-93-U; 3083-93-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Landawn Shopping Centres Limited (Respondent); National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Landawn Shopping Centre Limited and Jerome N. Sprackman (Respondents) (*Granted*)

1916-93-U: Teamsters Local Union No. 419 (Applicant) v. Safety-Kleen Canada Inc. (Respondent) (*Withdrawn*)

1956-93-U: The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 58, Toronto (Applicant) v. The Canadian Stage Corporation, c.o.b. under the firm name and style of The Canadian Stage Company (Respondent) (*Granted*)

2041-93-U: IWA Canada, Local 2693 (Applicant) v. Hood Logging Equipment Canada Incorporated (Respondent) (*Withdrawn*)

2048-93-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Dryden and District Association for Community Living (Respondent) (*Withdrawn*)

- 2122-93-U:** Edward Sturgeon (Applicant) v. International Brotherhood of Teamsters (Respondent) (*Dismissed*)
- 2370-93-U:** Brewery, General and Professional Workers' Union (Applicant) v. Randall Klein Design Inc. (Respondent) (*Withdrawn*)
- 2578-93-U:** Service Employees International Union, Local 204 Affiliated with the A.F. of L., C.I.O., C.L.C. (Applicant) v. McDonald's Restaurants of Canada Limited and Ballantyne Foods Ltd. (Respondents) (*Withdrawn*)
- 2768-93-U:** Teamsters Local 847 Laundry and Linen Drivers and Industrial Workers (Applicant) v. Cichon Enterprises Ltd. c.o.b. as Imperial Dust Control (Respondent) (*Dismissed*)
- 2796-93-U:** Rhonda Marshall (Applicant) v. Canadian Union of Public Employees, Local 1281 (Respondent) (*Withdrawn*)
- 2832-93-U:** International Union, United Plant Guard Workers of America (Applicant) v. Harold Security Service Limited (Respondent) (*Withdrawn*)
- 2986-93-U:** National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W.-Canada) (Applicant) v. Reynolds-Lemmerz Industries (Respondent) (*Withdrawn*)
- 3055-93-U:** Dinesh Agnihotri (Applicant) v. Teamsters Local 419 (Respondent) v. Desco Plumbing and Heating Supply Inc. (Intervener) (*Withdrawn*)
- 3085-93-U:** Emile Perron (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) (*Withdrawn*)
- 3094-93-U:** International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 357 (Applicant) v. Famous Players Inc. (Respondent) (*Withdrawn*)
- 3119-93-U:** Bill Lane, Al Lemieux, Helen Simpson and Dwight Sommers (Applicant) v. Retail, Wholesale & Department Store Union Local 461 (Respondent) v. The Hostess Frito-Lay Company (Intervener) (*Dismissed*)
- 3170-93-U:** Teamsters Local Union No. 419 (Applicant) v. 979504 Ontario Limited c.o.b. as Seafood Alliance Co. (Respondent) (*Withdrawn*)
- 3245-93-U:** International Ladies' Garment Workers' Union (Applicant) v. Niyen Properties Inc. operating under the firm name of Journey's End Motel (Respondent) (*Withdrawn*)
- 3258-93-U:** Phillip Clement (Applicant) v. Ontario Hydro and International Union of Operating Engineers and its Local 793 (Respondents) (*Dismissed*)
- 3270-93-U:** International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Oakville Hydro-Electric Commission (Respondent) (*Withdrawn*)
- 3359-93-U:** The Canadian Brotherhood of Railway Transport and General Workers (Applicant) v. Granite Club, Limited (Respondent) (*Withdrawn*)
- 3360-93-U:** Celliste Trinca (Applicant) v. International Union of Bricklayers, Local 29 (Respondent) (*Dismissed*)
- 3418-93-U:** Service Employees International Union, Local 204 (Applicant) v. Niagara Women in Crisis - Nova (Respondent) (*Withdrawn*)

3423-93-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Insulec Limited (Respondent) (*Withdrawn*)

3462-93-U: Canadian Brotherhood of Railway, Transport and General Workers (Applicant) v. The Granite Club Limited (Respondent) (*Withdrawn*)

3465-93-U: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild, (CLC, AFL-CIO) (Applicant) v. Now Communications Inc. (Respondent) (*Withdrawn*)

3476-93-U: Public Service Alliance of Canada (Applicant) v. James Bay General Hospital (Respondent) (*Withdrawn*)

3494-93-U: James Gooley (Applicant) v. United Electrical Workers Union Local 524 (Respondent) (*Withdrawn*)

3513-93-U: Hospitality and Service Trades Union, Local 261 (Applicant) v. 160572 Canada Inc. (c.o.b. Allpark Parking) (Respondent) (*Withdrawn*)

3528-93-U: Frank Della Penna (Applicant) v. Xerox Oakville Toner Plant and Amalgamated Clothing and Textile Workers Union Local 1414B (Respondents) (*Withdrawn*)

3529-93-U: Canadian Brotherhood of Railway, Transport and General Workers (Applicant) v. The Granite Club Limited (Respondent) (*Withdrawn*)

3545-93-U: Ontario Public Service Employees Union and its Local 403 (Applicant) v. Trenton and District Association for Community Living (Respondent) (*Withdrawn*)

3550-93-U: Susan Bauer (Applicant) v. York University and York University Staff Association (Respondents) (*Withdrawn*)

3571-93-U: IWA - Canada, Local 1 - 1000 (Applicant) v. Madawaska Hardwood Flooring Inc. (Respondent) (*Withdrawn*)

3612-93-U: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America (Applicant) v. L.O.F. Glass of Canada Ltd. c.o.b. as Vanfax (Respondent) (*Withdrawn*)

3622-93-U; 3665-93-U; 3711-93-U: Miracle Food Mart (Employees) (Applicant) v. United Food and Commercial Workers Union (Respondent) v. The Great Atlantic & Pacific Company of Canada Limited (Intervener); The Members of U.F.C.W. Locals 175/633 (Applicant) v. United Food & Commercial Workers International Union - Local 175/633 (Respondent) v. The Great Atlantic & Pacific Company of Canada Limited (Intervener); Malcolm Fullwood (Applicant) v. U.F.C.W. (Respondent) v. The Great Atlantic & Pacific Company of Canada Limited (Intervener) (*Granted*)

3623-93-U: Mario Aristodemo (Applicant) v. Heritage Clothing Ltd. and Toronto Joint Board Amalgamated Clothing and Textile Workers Union (Respondents) (*Dismissed*)

3639-93-U: Employees of Miracle Food Mart Store 440 (Applicant) v. The Great Atlantic & Pacific Company of Canada, Limited (Respondent) (*Granted*)

3671-93-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Cablecom International Network Cabling Inc. (Respondent) (*Withdrawn*)

3674-93-U: Hashim Mohammad Abul (Applicant) v. Hotel Plaza II (Respondent) v. Hotel Employees Restaurant Employees Union Local 75 (Intervener) (*Withdrawn*)

3677-93-U: Hospitality & Service Trades Union, Local 261 (Applicant) v. National Press Club Canada (Respondent) (*Withdrawn*)

- 3710-93-U:** Graphic Communications International Union, Local 500M (Applicant) v. Parker Pad and Printing Limited (Respondent) (*Withdrawn*)
- 3729-93-U:** Faiz Bhuiyan and Rosalinda Solamillo (Applicants) v. Borai Abdelrahman, Chief Shop Steward, Union Local 75 (Delta Chelsea Inn) (Respondent) (*Dismissed*)
- 3766-93-U:** Bruce McLeod (Applicant) v. Kirkland Lake Board of Education (Respondent) (*Withdrawn*)
- 3785-93-U:** Canadian Union of Professional Security-Guards (Applicant) v. Silhouette Security Systems Inc. (Respondent) (*Withdrawn*)
- 3789-93-U:** Amalgamated Clothing and Textile Workers Union (Applicant) v. Perma Foam Limited (Respondent) (*Withdrawn*)
- 3800-93-U:** All employees of Room Service Department at Delta Chelsea Inn Hotel (Applicant) v. Hotel Employees Restaurant Employees Union Local, 75 (Respondent) (*Dismissed*)
- 3804-93-U:** Ontario Public Service Employees Union (Applicant) v. Muki Baum Association for the Rehabilitation of Multi Handicapped Inc. (Respondent) (*Withdrawn*)
- 3813-93-U:** Labourers' International Union of North America, Local 183 (Applicant) v. Apollo 8 Maintenance Services Limited (Respondent) (*Withdrawn*)
- 3820-93-U:** Vinodkumar Sharma (Applicant) v. Teamsters Local Union 938 (Respondent) (*Withdrawn*)
- 3859-93-U:** Bakery, Confectionery & Tobacco Workers' International Union, Local 264 (Applicant) v. Bagos Bun Bakery Ltd., carrying on business as Sons Bakery (Respondent) (*Withdrawn*)
- 3863-93-U; 3998-93-U:** United Food and Commercial Workers International Union, Local 175 and 633 (Applicant) v. The Great Atlantic and Pacific Company of Canada Limited (Respondent) (*Withdrawn*)
- 3976-93-U:** Bert Flarity (Applicant) v. United Association of Plumbers & Steamfitters Local 46 (Respondent) (*Dismissed*)
- 4046-93-U:** United Food & Commercial Workers International Union, Local 175 (Applicant) v. Canadian Tire Petroleum (Respondent) (*Withdrawn*)

APPLICATION FOR INTERIM ORDER

- 2989-93-M:** United Steelworkers of America (Applicant) v. Mother Tucker's Food Experience (Canada) Inc. (Respondent) (*Withdrawn*)
- 3681-93-M:** Ontario Public Service Employees Union (Applicant) v. Rotary (Don Valley) Cheshire Home Inc. (Respondent) (*Granted*)
- 3784-93-M:** Canadian Union of Professional Security-Guards (Applicant) v. Silhouette Security Systems Inc. (Respondent) (*Withdrawn*)
- 3788-93-M:** Amalgamated Clothing and Textile Workers Union (Applicant) v. Perma Foam Limited (Respondent) (*Withdrawn*)
- 3803-93-M:** Ontario Public Service Employees Union (Applicant) v. Muki Baum Association for the Rehabilitation of Multi Handicapped Inc. (Respondent) (*Withdrawn*)
- 3814-93-M:** Labourers' International Union of North America, Local 183 (Applicant) v. Apollo 8 Maintenance Services Limited (Respondent) (*Withdrawn*)

3858-93-M: Bakery, Confectionery & Tobacco Workers' International Union, Local 264 (Applicant) v. Sons Bakery Ltd. (Respondent) (*Withdrawn*)

3864-93-M; 3999-93-M: United Food and Commercial Workers International Union, Locals 175 and 633 (Applicant) v. The Great Atlantic & Pacific Company of Canada Limited (Respondent) (*Withdrawn*)

3933-93-M: The Great Atlantic & Pacific Company of Canada, Limited (Applicant) v. United Food & Commercial Workers Union, Local 175 and 633, Malcolm Fullwood, Phyllis Stefanik, Burt McKaig, Irene Burggraf, Helene Thomas, Cindy Chick, Paul Shepherd, Shirley Butler, Jean Arnone, Jackie Matetich, Kathy Woodrich, Irma Maedel, Bernie Stevens, Marvin Teixeira and Bev Taylor (Respondents) (*Withdrawn*)

4038-93-M: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Custom Racks Limited (Respondent) (*Withdrawn*)

4045-93-M: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Canadian Tire Petroleum (Respondent) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

3749-93-M: Work Wear Corp. (Brantford) (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

3750-93-M: Work Wear Corp. (Windsor) (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

TRUSTEESHIP

2759-92-T: Canadian Paperworkers Union (Applicant) v. Canadian Paperworkers Union, Local 1597 (Respondent) (*Granted*)

JURISDICTIONAL DISPUTES

2816-93-JD: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; and International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128; International Union of Operating Engineers; and International Union of Operating Engineers Local 793; The International Brotherhood of Teamsters; and The International Brotherhood of Teamsters, Chauffeurs and Allied Workers, Local 230; The International Association of Bridge Structural and Ornamental Ironworkers; The International Association of Bridge Structural and Ornamental Ironworkers, Local 736; The IBEW Electrical Power Systems Construction Council of Ontario representing the following affiliated Local Unions: 105, 115, 120, 303, 353, 402, 532, 586, 773, 804, 894, 1687, 1739 and 1788; United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada; and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 527 (Applicants) v. Electrical Power Systems Construction Association; Dominion Metal and Refining Works Ltd., Multidem Inc., Labourers' International Union of North America, Ontario Provincial District Council, and Labourers' International Union of North America, Local 1059 (Respondents) (*Dismissed*)

3155-93-JD: International Association of Machinists and Aerospace Workers, Thunder Bay Lodge 1120 (Applicant) v. Sheet Metal Worker's International Association Local Union 397 and Daycon Mechanical Systems Limited (Respondents) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0031-93-M: Southern Ontario Newspaper Guild (Applicant) v. Thomson Newspapers Corporation, Cambridge Reporter, A Division of Thomson Newspaper Corporation (Respondents) (*Withdrawn*)

2018-93-M: Canadian Union of Public Employees, Local 2577 (Applicant) v. Children's Aid Society of the County of Lanark and the Town of Smiths Falls (Respondent) (*Terminated*)

3088-93-M: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Collingwood Nursing Home (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2700-92-OH: Ken Densmore (Applicant) v. Benn Iron Foundry (Supervisor Lavern Holden) (Respondent) (*Withdrawn*)

0079-93-OH: George Burleigh (Applicant) v. Job-Site Custom Coach (Respondent) (*Terminated*)

2833-93-OH: Michael David Aucoin (Applicant) v. Shipmaster Containers Limited (Respondent) (*Withdrawn*)

3146-93-OH: Labourers' International Union of North America, Local 597 (Applicant) v. Teperman and Sons Inc. (Respondent) (*Withdrawn*)

3502-93-OH: National Automobile and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 27 and employee Lloyd M. Jardine (Applicant) v. Diesel Division General Motors of Canada Limited (Respondent) (*Withdrawn*)

3823-93-OH: Michael Peria (Applicant) v. Contemporary Personnel Inc. and Pet Valu (Respondents) (*Withdrawn*)

COLLEGES COLLECTIVE BARGAINING ACT

2510-92-M: Ontario Public Service Employees Union Local 238 (Applicant) v. Conestoga College of Applied Arts and Technology (Respondent) (*Dismissed*)

2507-93-M: The Ontario Public Service Employees Union and its Local 421 (Applicant) v. Loyalist College of Applied Arts & Technology (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

3152-91-G; 0038-92-G: Millwright District Council of Ontario on its own behalf and on behalf of Local 1244 (Applicant) v. Inplant Contractors Inc., Flint Riggers and Erectors Inc. and 911846 Ontario Limited c.o.b. as Flint Industrial Services, (Respondents) (*Withdrawn*)

1482-92-G: Labourers' International Union of North America, Local 527 (Applicant) v. Donovan Services Ltd. (Respondent) v. Operative Plasterers and Cement Masons International Association of the United States and Canada Local 598 (Intervener) (*Granted*)

2684-92-G: International Union of Bricklayers and Allied Craftsmen Local No. 7, Ottawa-Hull (Applicant) v. Joe Arban Contractor Limited (Respondent) (*Granted*)

1349-93-G: Sheet Metal Workers' International Association Local 47 (Applicant) v. Metarroof & Siding Specialties Ltd. (Respondent) (*Granted*)

1639-93-G; 2343-93-G: Labourers' International Union of North America, Local 527 (Applicant) v. Joe Arban Contractor Ltd. (Respondent); Labourers' International Union of North America, Local 527 (Applicant) v. Joe Arban Contractors Ltd. (Respondent) (*Granted*)

1949-93-G: Sheet Metal Workers' International Association, Local 397 (Applicant) v. Daycon Mechanical Systems Ltd. (Respondent) (*Withdrawn*)

2341-93-G: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. Joe Arban Contractors Limited (Respondent) (*Granted*)

2601-93-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Spencer Construction Company Ltd. and Ian Spencer (Respondent) (*Granted*)

2603-93-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. The D.P. Apex Building Corporation and Mark Dalton and Damir Persic (Respondent) (*Granted*)

2669-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. K and K Services, Aberfoyle Steel Incorporated (Respondents) (*Withdrawn*)

2763-93-G: United Brotherhood of Carpenters and Joiners of America, Lake Ontario District Council (Applicant) v. Electrical Power Systems Construction Association (Respondent) (*Withdrawn*)

2921-93-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Northern Elevator Service Limited (Respondent) (*Granted*)

3043-93-G; 3044-93-G; 3045-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Calorific Construction Limited (Respondent); International Association of Bridge, Structural and Ornamental Iron Workers, Local 736 (Applicant) v. Calorific Construction Limited (Respondent) (*Granted*)

3109-93-G: International Brotherhood of Electrical Workers, Local Union 1687 (Applicant) v. Anmar Mechanical and Electrical Contractors Ltd. (Respondent) (*Withdrawn*)

3178-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Zek - Beck Steel Fabricators (Respondent) (*Granted*)

3179-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Windsor Joist Manufacturing Inc. (Respondent) (*Granted*)

3180-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Bramcan Steel Corp. (Respondent) (*Granted*)

3181-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Cyrville Construction Equipment Ltd. (Respondent) (*Granted*)

3288-93-G: Labourers' International Union of North America, Local 527 (Applicant) v. C.P.M. Paving Company Ltd. (Respondent) (*Withdrawn*)

3289-93-G: Labourers' International Union of North America, Local 527 (Applicant) v. Ottawa Structural Concrete Services Ltd. (Respondent) (*Withdrawn*)

3332-93-G: Local 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. Honeywell Limited (Respondent) (*Withdrawn*)

3333-93-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. E.S. Fox Limited (Respondent) (*Withdrawn*)

- 3395-93-G:** Labourers' International Union of North America, Local 1081 (Applicant) v. George and Asmus-sen Limited (Respondent) (*Granted*)
- 3484-93-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Bracknell Corporation, c.o.b. as State Contractors (Respondent) (*Withdrawn*)
- 3517-93-G:** Teamsters Local Union No. 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Ragno Excavating Ltd. (Respondent) (*Terminated*)
- 3522-93-G:** Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Ritin Construction Ltd. and Melin Interior Systems Inc. (Respondents) (*Granted*)
- 3557-93-G:** International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Lenwick Building Systems Inc. (Respondent) (*Withdrawn*)
- 3590-93-G:** Labourers' International Union of North America, Local 183 (Applicant) v. G.E.A.R. Contracting Inc. (Respondent) (*Granted*)
- 3595-93-G:** International Union of Operating Engineers, Local 793 (Applicant) v. Starview Contracting Ltd. (Respondent) (*Granted*)
- 3596-93-G:** International Union of Operating Engineers, Local 793 (Applicant) v. S & D Equipment Rental Ltd. (Respondent) (*Granted*)
- 3604-93-G:** International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Campbell-Cox Limited (Respondent) (*Granted*)
- 3618-93-G:** International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Guild Electric Ltd. (Respondent) (*Withdrawn*)
- 3621-93-G:** International Union of Bricklayers and Allied Craftsmen Local #2, Ontario Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Findlay-Jones Insulation Limited (Respondent) (*Withdrawn*)
- 3635-93-G:** Carpenters and Allied Workers, Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. M.D. Contracting (Respondent) (*Granted*)
- 3636-93-G:** Construction Workers Local 53, CLAC (Applicant) v. Empire Roofing Corporation (Respondent) (*Withdrawn*)
- 3652-93-G:** United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Lavern Asmussen Ltd. and Lavern Asmussen (1991) Inc. (Respondents) (*Withdrawn*)
- 3672-93-G; 3673-93-G:** United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Belanger Construction Limited (Respondent) (*Withdrawn*)
- 3687-93-G:** International Union of Operating Engineers, Local 793 (Applicant) v. JDR Tools & Equipment Division of 810332 Ontario Inc. (Respondent) (*Granted*)
- 3688-93-G:** International Union of Operating Engineers, Local 793 (Applicant) v. 877138 Ontario Inc. O/A Bud's Contracting (Respondent) (*Granted*)
- 3702-93-G:** International Association of Bridge, Structural and Ornamental Iron Workers, Local 759 (Applicant) v. Murillo Iron Works (Respondent) (*Granted*)
- 3705-93-G:** International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. Lakeview

Painting (1990) Limited, Interior Building Supplies Company Ltd., Industrial Coatings & Equipment Ltd., and 957448 Ontario Inc. c.o.b. as 448 Services (Respondents) (*Granted*)

3706-93-G: Sheet Metal Workers' International Association Local Union No. 285 (Applicant) v. Rep Ventilation Ltd. (Respondent) (*Granted*)

3719-93-G: International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Electrical Power Systems Construction Association and Power Tel Utilities Contractors Limited (Respondents) (*Withdrawn*)

3724-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. J. Lepera Paving Contracting & Engineering Ltd. (Respondent) (*Granted*)

3737-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Resar Construction Inc. (Respondent) (*Granted*)

3741-93-G: Sheet Metal Workers' International Association Local Union 562 (Applicant) v. Nelco Mechanical Limited (Respondent) (*Granted*)

3748-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Crusoe Holding Inc. c.o.b. Scott Excavating (Respondent) (*Granted*)

3751-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Mitchell Construction Ltd. (Respondent) (*Withdrawn*)

3786-93-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Black & McDonald Limited (Respondent) (*Withdrawn*)

3799-93-G: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Peran Contracting (1987) Ltd. (Respondent) (*Withdrawn*)

3801-93-G: Construction Workers Local 53, CLAC (Applicant) v. Empire Roofing Corporation (Respondent) (*Withdrawn*)

3815-93-G: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. Classic Masonry Contracting Ltd. (Respondent) (*Granted*)

3817-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Victory Plumbing Inc. (Respondent) (*Granted*)

3843-93-G: Labourers' International Union of North America, Local 527 (Applicant) v. Wesbrook Construction Ltd. (Respondent) (*Granted*)

3844-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Fusic Engineering Co. Ltd. (Respondent) (*Granted*)

3855-93-G; 3873-93-G: Sheet Metal Workers' International Association Local 47 (Applicant) v. Mount Royal Contracting Limited (Respondent) (*Granted*)

3888-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Superior Door Gate Systems Inc. (Respondent) (*Withdrawn*)

3904-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Bramcan Steel Corp. (Respondent) (*Granted*)

3954-93-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Classic Masonry Contracting Ltd. (Respondent) (*Granted*)

4004-93-G: Labourers' International Union of North America, Local 527 (Applicant) v. Amantea Masonry Contractor (Respondent) (*Granted*)

MINISTER'S REFERENCE (SEC. 3(2)) HLDA

3067-93-M: Canadian Union of Public Employees, Local 3678 (Applicant) v. Quadrille Development Corporation c.o.b. as the Residence on the St. Clair (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0956-91-R: Labourers' International Union of North America, Local 183 (Applicant) v. Sundial Bricklayers Ltd. (Respondent) (*Dismissed*)

3527-92-U: William A. Curtis (Applicant) v. The Communications, Energy & Paperworkers Union of Canada, The Canadian Paperworkers Union (Respondent) (*Dismissed*)

1700-93-U; 1701-93-M: Associated Contracting Inc. (Applicant) v. Michael Gallagher and International Union of Operating Engineers, Local 793 (Respondent) (*Dismissed*)

1918-93-U: Antonio Vicente (Applicant) v. United Steelworkers of America (Respondent) v. Cambridge Brass (Intervener) (*Dismissed*)

2404-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Meadowdale Security Guard Services Inc. (Respondent) (*Dismissed*)

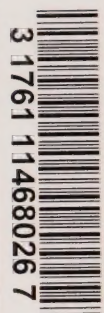
2786-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. K & E Waste Resource Inc. (Respondent) (*Dismissed*)

RIGHT OF ACCESS

3947-93-M: The Great Atlantic & Pacific Company of Canada, Limited (Applicant) v. United Food & Commercial Workers International Union, Locals 175 and 633, Malcolm Fullwood, Phyllis Stefanik, Burt McKaig, Irene Burggraf, Helene Thomas, Cindy Chick, Paul Shepherd, Shirley Butler, Jean Arnone, Jackie Matetich, Kathy Woodrich, Irma Maedel, Bernie Stevens, Marvin Teixeira and Bev Taylor (Respondents) (*Withdrawn*)

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